Supreme Court, U.S.
FILED
NOV 12 1992
OFFICE OF THE CLERK

No. 91-7849

In The

Supreme Court of the United States

October Term, 1992

STEPHEN BUCKLEY,

Petitioner,

vs.

MICHAEL FITZSIMMONS, et al.,

Respondents

On Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

JOINT APPENDIX

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Petition For Certiorari Filed April 1, 1992
Certiorari Granted October 5, 1992

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113 pp

TABLE OF CONTENTS

Page

Relevant Docket Entries in the courts below 1

First Amended Complaint 3

Opinion of the United States District Court for the Northern District of Illinois, June 9, 1989 25

Order of the District Court directing entry of final judgment pursuant to F.R.C.P. 54(b), August 8, 1989 62

Judgment in a civil case, August 10, 1989..... 65

Opinion of the United States Court of Appeals for the Seventh Circuit, December 5, 1990 66

Order of the Supreme Court of the United States October 7, 1991..... 101

Opinion of the United States Court of Appeals for the Seventh Circuit, January 2, 1992 102

Order of the Supreme Court of the United States, granting certiorari and leave to proceed in forma pauperis, October 5, 1992 111

RELEVANT DOCKET ENTRIES

Filing date	Document
3/4/88	Plaintiff's Complaint
7/28/88	Plaintiff's First Amended Complaint
8/19/88	Answer of defendants Doria, Wilkosz, Vosburgh, Soucek, Lepic, Kurzawa, Burandt, Schmitt
8/19/88	Motion to Dismiss of defendants Fitzsimmons, Ryan, Kilander, Knight and King
8/19/88	Motion to Dismiss of defendants German, Olsen and Estate of Louise Robbins
8/19/88	Motion to Dismiss of County of DuPage
9/28/88	Defendant's memoranda of law in support of their motions to dismiss
12/13/88	Plaintiff's memoranda in response to defendants' motions to dismiss
1/24/89	Defendants' reply memoranda in support of their motions to dismiss
6/12/89	District Court ruling on motions to dismiss
7/10/89	Plaintiff's Notice of Appeal
8/8/89	District Court enters order directing final judgment pursuant to F.R.C.P. 54(b)
8/10/89	Judgment in a civil case
9/7/89	Plaintiff's Notice of Appeal
12/5/90	Decision of the United States Court of Appeals for the Seventh Circuit

3/5/91	Petition for Writ of Certiorari filed in United States Supreme Court by Stephen Buckley
10/7/91	United States Supreme Court vacates judgment and remands to Court of Appeals for the Seventh Circuit for further consideration.
1/2/92	Decision of the United States Court of Appeals for the Seventh Circuit

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IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

STEPHEN BUCKLEY Plaintiff, vs. COUNTY OF DUPAGE, RICHARD DORIA, WARREN WILKOSZ, THOMAS VOSBURGH, ROBERT SOUCEK, KENNETH LEPIC, DENNIS KURZAWA, JAMES BURANDT, DONALD SCHMITT, J. MICHAEL FITZSIMMONS, JAMES RYAN, ROBERT KILANDER, THOMAS KNIGHT, PATRICK KING, EDWARD GERMAN, ROBERT OLSEN, ESTATE OF LOUISE ROBBINS, JOHN DOE, PETER POE AND OTHERS NOT PRESENTLY KNOWN, Defendants.	)	No. 88 C 1939 Judge Leinenweber

FIRST AMENDED COMPLAINT JURISDICTION

1. The jurisdiction of the Court is invoked pursuant to the Civil Rights Act, 42 U.S.C. 1981, et seq.; the Judicial Code, 28 U.S.C. 1331 and 1343(3); the Constitution of the United States; and pendent jurisdiction.

PARTIES

1. Plaintiff STEPHEN BUCKLEY is a citizen of the United States and a resident of Aurora, Illinois.

2. Defendant COUNTY OF DuPAGE is a municipal corporation duly incorporated under the laws of the State of Illinois, and as such is responsible for the policies, practices, and customs of the DuPage County Sheriff's Department and States Attorney's Office, as well as for their employees, including the named Defendants herein.

3) Defendant RICHARD DORIA was, at all relevant times, the Sheriff of DuPage County and, as such, was, as a matter of law and fact, a final decisionmaker for DuPage County with regard to all the administrative, investigative, arrest, and custodial acts and decisions alleged herein.

4) Defendant ROBERT SOUCEK was, at all relevant times, Deputy Chief of the Criminal Bureau of the DuPage County Sheriff's Office.

5) Defendant Kenneth Lepic was, at all relevant times, a Lieutenant assigned to the Detective Division of the DuPage County Sheriff's Office.

6) Defendant JAMES BURANDT was, at all relevant times, a Sergeant assigned to the Detective Bureau of the DuPage County Sheriff's Office and was in charge of the evidence gathered in the Nicarico homicide investigation.

7) Defendants WARREN WILKOSZ, DENNIS KURZAWA, THOMAS VOSBURGH, JOHN DOE, and others not presently known were, at all relevant times, DuPage County Sheriff's police detectives and employees assigned to the Nicarico homicide investigation; additionally Defendant Wilkosz was assigned to work directly with the Defendant prosecutors on the Nicarico grand jury investigation.

8) Defendant DONALD SCHMITT was, at all relevant times, a DuPage County Deputy Sheriff assigned as a Quartermaster.

9) Defendant ED GERMAN was, at all relevant times, an employee of the Illlinois [sic] Department of Law Enforcement, assigned to their Bureau of Scientific Services.

10) Defendant ROBERT OLSEN was, at all relevant times, an employee of the Kansas Bureau of Investigation, assigned to their Crime Laboratory.

11) Defendant LOUISE ROBBINS, an anthropologist and now deceased, was, at all relevant times, a resident of North Carolina. The Estate of Louise Robbins is administered by Margaret Bushnell, 1500 Cardiff Lane, High Point, North Carolina.

12) Defendant J. MICHAEL FITZSIMMONS was the duly elected DuPage County State's Attorney, from November, 1968 to November, 1984 and as such was, as a matter of law and fact, a final decisionmaker for DuPage County with regard to all the administrative, investigative, arrest, custodial, and prosecutorial acts and decisions alleged herein.

13) Defendant JAMES RYAN has been, from November, 1984 to the present the duly elected DuPage County State's Attorney, and as such was and is, as a matter of law and fact, a final decision maker with regard to all administrative, investigative, arrest, custodial, and prosecutorial acts and decisions alleged herein.

14) Defendant THOMAS KNIGHT was, until November of 1984, Assistant DuPage County States

Attorney in charge of the Criminal Division and was assigned to the Nicarico investigation and prosecution; thereafter he was a duly appointed DuPage County Special Prosecutor appointed for the express purpose of investigating and prosecuting the Nicarico case.

15) Defendant ROBERT KILANDER has been, from December of 1984 to the present, the First Assistant States Attorney of DuPage County, and, after the Plaintiff's hung jury and resultant mistrial, was assigned to the Nicarico investigation and Plaintiff's re-prosecution.

16) Defendant PATRICK KING was, at all relevant times, an Assistant DuPage County States Attorney assigned to the Nicarico case investigation and prosecution.

17) Defendants PETER POE, and others yet unknown are assistant DuPage County States Attorneys.

18) At all relevant times, each of the above named Defendants were acting under color of law, or jointly and/or in conspiracy with those who were so acting, and are sued in their individual and official capacities.

FACTS

19) On February 25, 1983, 11 year old Jeanine Nicarico was abducted from her home in Naperville, Illinois, sexually abused, and murdered. Her body was found a few days later along the Prairie Path, in DuPage County.

20) An intensive investigation into the murder was commenced by the DuPage County Sheriff's Office and the DuPage County States Attorneys Office, under the

direction and responsibility of Defendant Sheriff Doria and Defendant States Attorney Fitzsimmons, respectively.

21) Ever since the abduction, there has been extensive publicity about, and interest in, the Nicarico case, which, in DuPage County at least, has engendered intense emotions in the community. This climate exerted great public pressure upon the Defendants to find someone to charge and prosecute for this heinous crime.

22) In the early stages of the investigation, a bootprint was discovered on the door of the Nicarico home. Sheriff's detectives concluded that it was left by the killer when he kicked in the door. At approximately the same time, a mentally disturbed and totally incredible person, Alex Hernandez, allegedly told Sheriff's detectives that Plaintiff Stephen Buckley was present for a post murder conversation in which the murder was discussed.

23) On that basis, Sheriff's detectives went to Plaintiff's home and questioned Plaintiff without a lawyer. He denied any knowledge of the crime, and voluntarily produced his boots. At about the same time, a description of a person allegedly seen in the area of the Nicarico home on the afternoon of the abduction, and an FBI composite sketch drawn from the description was supplied to the Defendants. The description and sketch were dissimilar to Plaintiff.

24) At the direction of Defendant Sheriff Doria, John Gorayczyk, the Sergeant in charge of the identification section of the DuPage County Crime Lab, made a comparative examination of the Plaintiff's boots with the bootprint on the Nicarico door, and concluded that they did not match.

25) Gorayczyk confirmed his conclusion with the head of the DuPage County Crime Lab, and immediately communicated it to, *inter alia*, Defendants Doria, Soucek, Burandt and Schmitt. These conclusions became general knowledge among all of the Sheriffs' police Defendants, and, either at that time or subsequent thereto, were made known to Defendants Fitzsimmons, Knight and King.

26) Defendant Doria then caused the boots to be removed from Gorayczyk's custody before he could complete his tests and write a report, and Doria sent them to Defendant Edward German of the Illinois Department of Law Enforcement Crime Lab for examination.

27) Defendant German examined the boots and at first concluded in handwritten notes that Plaintiff's boot "could have at best" made the footprint on the door and that "another shoe could very well have made the prints." In his official report he simply concluded that the Plaintiff's boot "could have" made the prints and omitted the remainder of his prior conclusions. His report and his notes were sent to Defendant Burandt, and the contents were shared with the Sheriff, States Attorney and their Defendant-subordinates.

28) Defendant Knight, and various others [sic] Defendants, including Doria, Fitzsimmons, and Burandt, apparently not satisfied with Defendant German's conclusions, contacted anthropologist Louise Robbins and Defendant Olsen of the Kansas Bureau of Indentification [sic] Crime Lab in search of a positive boot identification.

29) Defendant Olsen, after reviewing Defendant German's notes and report, and without the benefit of the boot itself, concluded that Plaintiff's boot and the

Nicarico bootprint had some "similar class characteristics, but the paucity of sufficient similar individual characteristics precluded a positive identification."

30) Defendant Olsen reduced these findings to a report, which was sent, along with German's report and notes, to Defendants Knight and German. Defendant Knight shared Olsen's conclusions with Defendant Burandt, and, with various other Defendants, including Fitzsimmons, King, Doria, Soucek, and Wilkosz.

31) Confronted with three different expert reports which failed to match Plaintiff's boot with the footprint on the door, the Defendants, including Knight, Burandt, and German, procured their "positive identification" from Louise Robbins, whose theories and reputation in the forensic community were generally discredited and viewed with great skepticism, a fact these Defendants knew or should have known.

32) Defendants Knight and King were involved with the Sheriff's police in all the early stages of their investigation, including the interrogation of witnesses and potential suspects. Specifically, Sheriff's detectives, including Defendants Wilkosz and Kurzawa, at the direction and under the supervision, and sometimes in the presence and with the assistance of Defendants Knight, King, Soucek and Lepic, repeatedly interrogated alleged suspects including Plaintiff Buckley and Alex Hernandez, who were not represented by counsel. Despite intense pressure and intimidation, Plaintiff Buckley steadfastly maintained his innocence and demonstrated no knowledge of the crime, while Hernandez told such wild and

palpably false stories that his mental instability was obvious to the Defendants.

33) As a result of these interrogations, at least one experienced Sheriff's detective who participated concluded that Buckley and Hernandez were not involved in the Nicarico crime. This conclusion was buttressed by his general knowledge of the bootprint "evidence."

34) He repeatedly communicated his conclusion, and its basis, to the Defendants named herein, including Defendants Doria, Knight, King, Soucek, Lepic, and Wilkosz.

35) Unable to solve the case, Defendants Doria, Fitzsimmons, Knight and King convened a special DuPage County "investigative" grand jury, devoted solely to investigating the Nicarico case.

36) Defendants Knight, King, Doria, Soucek, Lepic and Wilkosz, with the knowledge and approval of Defendant Fitzsimmons, used the grand jury as an investigative tool, *inter alia*, by further interrogating, intimidating, and badgering potential suspects, including the Plaintiff, when they were called before it without counsel. Despite this utilization of unabashedly strong armed interrogation techniques by Defendant Knight, Plaintiff Buckley continued to maintain his innocence before the Grand Jury and again demonstrated no knowledge of the crime.

37) Defendants Knight, King, Wilkosz, and Burandt, with the knowledge of Defendants Fitzsimmons, Doria, Soucek, and Lepic, further abused the grand jury process by presenting only the "favorable" portions of the boot evidence, while intentionally withholding Gorayczyk's

findings, as well as misrepresenting Olsen and German's conclusions.

38) Moreover, they presented a large amount of obviously incredible, irrevelant, false, and contradictory hearsay and double hearsay evidence designed to improperly prejudice the Plaintiff and (illegible) suspects before the jury.

39) The Defendants, including Doria, Soucek, Lepic, Knight, King and Wilkosz, also offered reward money, which induced suspect Alex Hernandez to make further false, inculpatory statements in pursuit of the money; those statements were placed before the Grand Jury despite the fact that they were independently shown to be false and completely unreliable by further investigation.

40) Those Defendants, including Defendants Vosburgh and Knight, also interrogated another suspect, Rolando Cruz, without counsel, and gave him financial payments and a rent free apartment in exchange for inculpatory testimony which was also placed before the Grand Jury despite its obvious lack of credibility.

41) Despite this unremitting abuse of the grand jury process, and after more than 8 months of "evidence" and over 100 witnesses were presented to the Grand Jury, Defendant Fitzsimmons publicly admitted, on January 27, 1984, that there was insufficient evidence to indict or prosecute. This was four months *after* the bootprint evidence had been presented to the Grand Jury.

42) On March 9, 1984, twelve days before the Republican primary election in which Defendant Fitzsimmons was facing the challenge of Defendant Ryan, Defendants Fitzsimmons, Knight, King, and Doria obtained grand jury indictments for murder, rape, and burglary against Plaintiff Buckley, Alex Hernandez, and Rolando Cruz. No new evidence of importance was presented after January 27th.

43) The indictments were obtained despite the absence of probable cause in order to defuse public pressure, to cover up their inability to solve the crime, to aid Defendant Fitzsimmons in his political campaign, and to further coerce the Plaintiff and his co-indictees to reveal information about the crime and/or falsely inculpate themselves or each other.

44) Defendant Fitzsimmons publicly announced the indictments, falsely asserting that numerous pieces of evidence, including the bootprint evidence, led to the conclusion that the Plaintiff and his co-indictees, along with some other unindicted suspects, were part of a burglary ring who committed the Nicarico crime. He released "mug shots" of the Plaintiff and his co-indictees to the media, which were prominently and repeatedly displayed on television and in the newspapers.

45) These false and prejudicial statements inflamed the populace of DuPage County against the Plaintiff and his co-indictees.

46) The Defendants, at the direction of Defendants Doria, Knight and Soucek then arrested and imprisoned Plaintiff Buckley and his co-indictees on 3 million dollars

bond, and Defendants Knight, King, and various Defendant Sheriff's detectives again interrogated them, offering them grace from the death penalty if they made false admissions or bore false witness against their co-Defendants.

47) Plaintiff Buckley continued to maintain his innocence and to deny knowledge of the murder, while co-Defendant Hernandez retracted his prior "admissions", while being interrogatored [sic] by Defendants Knight and King, stating that he had made them in an attempt to obtain the reward money offered by the Defendants.

48) These post-indictment interrogations further reinforced the conclusion that the Plaintiff and his co-indictees were not involved in the Nicarico murder, and this fact was repeatedly reaserted [sic] to the Defendants, including Doria, Soucek, Knight, and King, by the same sheriff's detective who had previously done so.

49) The Defendants continued to ignore this detective's conclusions, and after he pursued a lead concerning another *Nicarico* suspect, he was removed from the Nicarico investigation and given unfavorable assignments, compelling him to resign from the force. The head of the DuPage County Crime Lab was forced to resign for similar reasons.

50) The Defendants, including Knight, King, Doria, Soucek, Burandt, and Lepic, secreted the Gorayczyk boot evidence from the Plaintiff and his defense lawyers, who only discovered this information by independent investigation on the eve of trial.

51) In March of 1984 Defendant Ryan defeated Defendant Fitzsimmons in the Republican Primary for DuPage County States Attorney and in November of 1984 Ryan won the general election.

52) In December of 1984 Defendant Ryan assumed the duties of DuPage County States Attorney, appointed Defendant Knight as the special Nicarico case prosecutor, and approved and authorized the continued imprisonment and prosecution of the Plaintiff and his co-indictees.

53) The Defendants, including Defendants Knight, Doria, Burandt, German, Olsen, Schmitt, and Robbins, continued to construct and shape their boot "evidence" which was designed to falsely implicate the Plaintiff, despite all the contrary evidence which demonstrated that his boot did not make the print on the Nicarico door, and which otherwise established that he was not involved in the crime.

54) In January of 1985 Defendants Knight and King, with the approval and under the supervision of Defendants Ryan and Kilander, proceeded to select a jury and jointly try the Plaintiff and his co-Defendants in a highly prejudicial and inflamed atmosphere, occasioned, at least in part, by public statements made and/or prompted by the Defendants.

55) At trial the Defendant prosecutors presented as the cornerstone of their case against Plaintiff, manufactured boot "evidence" through Defendants Robbins, German, Schmitt and Olsen, who presented false opinions, which, in the case of Olsen and German, were significantly at variance from their original reports and notes.

56) At trial the Defendant prosecutors also presented the false inculpatory statements of Plaintiff's co-Defendants which had been obtained by the Defendants' coercive interrogations, promises of rewards, and other financial inducements.

57) Despite this highly charged and prejudicial atmosphere and the presentation of this manufactured, and unfairly prejudicial evidence, the jury, while convicting Plaintiff's co-Defendants, were hung as to the Plaintff's [sic] guilt or innocence, and the Court declared a mistrial.

58) Nonetheless the Defendants, including Ryan, Kilander, Doria, Soucek, Knight, and King, immediately decided to continue Plaintiff's imprisonment and to retry him. Defendant Knight publicly announced this decision directly after the verdicts were returned, and it was widely reported in the media.

59) Defendant Fitzsimmons made additional post trial statements which ware published in which he falsely claimed that Plaintiff was guilty of raping and killing Jeanine Nicarico, while the Defendant States Attorneys and Sheriff's police, including Knight and Doria, continued to make prejudicial public statements, and to manipulate the press coverage by, inter alia, prompting the Nicarico family and friends to make inflammatory public statements that the Plaintiff was guilty of the crime.

60) In June of 1985 Brian Dugan of Aurora, Illinois, was charged with several sexual assaults in Kane County, and on June 25, 1985, with the murder and rape of 7 year old Melissa Ackerman of LaSalle County. The Defendants were immediately put on notice by the recently resigned

Sheriff's detective that they should investigate Dugan as a potential suspect in the Nicarico murder, because of the similiarities [sic] between the two crimes.

61) Within a week, Dugan admitted to his public defender that he had not only murdered and raped Melissa Ackerman, but also that he murdered and raped Jeanine Nicarico and a woman named Donna Schnnor. The public defender then took a detailed statement from Dugan concerning the Nicarico murder.

62) In November of 1985, the details of Dugan's Nicarico confession, which included the fact that he acted alone, and details which had not been publicly revealed and could only be known to the murderer, were conveyed to Defendants Knight, Kilander, and then to the other Defendants, including Ryan, Doria, Soucek, and Lepic.

63) Dugan's attorney proposed that Dugan would plead guilty to these three murders and rapes, in exchange for life sentences; the Kane and LaSalle County prosecutors accepted, but the DuPage County Defendants, including Ryan, Doria, Knight, Kilander, Soucek and Lepic, refused, and instead again decided to continue Plaintiff's arrest, imprisonment, and re-prosecution.

64) They persisted in this decision even after Dugan passed a December, 1985 polygraph test in which he repeated his admission that he alone committed the Nicarico murder, and again after he gave a detailed videotaped confession while under hypnosis later the same month.

65) Furthermore, Defendant Knight made false and misleading statements which were published in the

media and which were designed to discredit Dugan's confession, to further prejudice the Plaintiff, and to justify his continued arrest, imprisonment and prosecution.

66) In June of 1986 Plaintiff's defense lawyers presented additional evidence – the conclusion of a highly respected F.B.I. footprint expert that Buckley's shoe did not make the Nicarico print – to the Defendants, but they nonetheless continued the arrest, imprisonment and prosecution of the Plaintiff and opposed the lowering of Plaintiff's bond from $3 million.

67) In September of 1986, Defendant Kilander interrogated a DuPage County prisoner who allegedly told him that Plaintiff had made a highly inculpatory statement to him.

68) On September 19, 1986, during jury selection for Plaintiff's retrial, Defendants Knight and Kilander informed the Court of this purported statement, and as a result Plaintiff's trial was aborted. The statement appeared in the media the next week and shortly thereafter, Plaintiff's lawyers established that it was physically impossible for the Plaintiff to have made the statement, and further, the prisoner denied telling Kilander that Plaintiff had made the statement.

69) In January of 1987, the Defendants sought another continuance in Plaintiff's retrial, claiming that their anthropologist "expert", Louise Robbins, was seriously ill, and, although able to testify, could not travel from her North Carolina home.

70) Fearing that Robbins was terminally ill, Plaintiff's defense lawyers sought a video-taped examination

of her for use at the retrial, but the Defendants opposed this request, and it was denied.

71) Mrs. Robbins died a short time later, and in March 1987, the Defendants dismissed Plaintiff's prosecution and terminated his arrest and imprisonment, three years after Plaintiff was arrested.

72) The Defendants, including Defendants Ryan, Doria, Knight, Kilander, King, Soucek and Lepic decided to use the pretext of Mrs. Robbins' death to publicly explain the dismissal rather than to admit that the Plaintiff was innocent of the Nicarico murder and that they had arrested, imprisoned, and prosecuted the wrong men.

73) This pretextual reason was asserted publicly by these Defendants and widely reported by the media.

74) The Defendants, to this day, still refuse to admit that they arrested, imprisoned, and prosecuted the wrong men, and in furtherance of this continued cover up, have refused to dismiss the case against Plaintiff's Co-Defendants, who were sentenced to death plus 255 years and who they are now reprosecuting after their convictions were reversed on appeal.

75) Plaintiff has a continuing and unremitting fear that the Defendants will re-arrest, re-imprison, and re-prosecute him for the Nicarico murder despite his clear innocence, particularly in retribution for his filing and pursuing this lawsuit.

COUNT 1
(42 USC 1983 Claim)

76) Plaintiff realleges paragraphs 1-75

77) The acts and omissions of the Defendants, as alleged above, were done under color of law and without probable cause, thereby constituting false arrest and imprisonment, in violation of Plaintiff Buckley's fourth and fourteenth amendment rights and 42 USC 1983.

78) These acts and omissions also violated Plaintiff's right to a fair trial, were done to publicly prejudice and defame him, and were committed, inter alia, in order to cover up the Defendants' failure to solve the crime, to cover up their arrest, imprisonment and prosecution of the wrong men, and to further Defendant Fitzsimmons and Doria's political career, in violation of Plaintiff's 14th Amendment right to due process of law, and 42 USC 1983. These due process violations also directly caused the jury to be deadlocked, rather than to acquit Plaintiff, thereby directly causing his continued imprisonment for an additional two years.

79) These acts and omissions, including, *inter alia*, the abuse of the grand jury process and its power to indict, also violated Plaintiff's right to counsel and to remain silent, in violation of his fifth, sixth and fourteenth amendment rights, and 42 USC 1983.

80) Furthermore each Defendant reached an understanding, engaged in a sequence of events, or joint course of conduct and/or otherwise agreed and conspired together to violate the constitutional rights of Plaintiff Buckley, with the mutual purpose, objective and/or knowledge that it would deprive him of said rights.

81) Said conspirac(ies)/joint action(s) was/were effected under color of law and violated Plaintiff's fourth, fifth, sixth, and fourteenth amendment rights. The overt acts in furtherance of the conspirac(ies)/joint action(s) are set forth in paragraphs 19-75 above.

82) These acts and omissions directly and proximately injured Plaintiff Stephen Buckley by causing him pain, suffering, fear, mental anguish, humiliation, defamation, loss of work, loss of freedom, and out of pocket costs and expenses, which injuries continue to this day and will continue in the future.

Wherefore, Defendant Buckley demands judgment, jointly and severally, against each and every Defendnt [sic] named in this complaint except the County of DuPage, in the amount of $5 million dollars, plus punitive damages in the amount of $3 million dollars against each of those same Defendants, individually, plus costs, attorneys fees, and whatever additional relief this Court deems just and equitable.

COUNT II
(1983 *Monell* claim)

83) Plaintiff realleges paragraphs 1-82.

84) Defendant Doria, as Sheriff of DuPage County, and Defendants Fitzsimmons and Ryan, as the duly elected States Attorney of DuPage County, were, by operation of state law and as a matter of fact, the final decisionmakers with regard to the investigative, prosecutorial, arrest, custodial, and administrative acts and decisions which they are above alleged to have made

or participated in. Moreover, certain other acts and decisions made by Defendants Knight, Kilander, Soucek and Lepic were in areas where final decision making powers had been delegated to them by the Sheriff and/or States Attorney.

85) These acts, edicts, and decisions, directly and proximately caused the constitutional violations and injury to the Plaintiff, and are directly chargeable to the Defendant County of DuPage because of their status as final decisionmakers.

86) Additionally, or alternatively, the County of DuPage, through its Sheriff's Department and its States Attorneys Office, has *de facto* policies, practices, and customs, including one which provided that evidence exculpatory to the target of the grand jury or that otherwise negates probable cause is not presented to the Grand Jury.

87) Said *de facto* policies, practices, and customs were a direct and proximate cause of Plaintiff's injuries and Constitutional violations, thereby making them directly chargeable to the County of DuPage.

Wherefore Plaintiff Buckley demands judgment, in the amount of $5,000,000 against the County of DuPage, and against Defendants Doria, Fitzsimmons, Ryan, Soucek, Kilander and Lepic in their official capacity, and since the policy was implemented with malicious intent, $3,000,000 in punitive damages, plus costs, attorneys fees, and whatever additional relief this Court finds equitable and just.

COUNT III

(Pendent state law claim for false arrest, imprisonment, malicious prosecution and defamation under Illinois and common law)

88) Plaintiffs reallege paragraphs 1-87.

89) Defendants named in paragraphs 1-18 above falsely arrested and imprisoned Plaintiff Stephen Buckley, without probable cause, and with malicious intent, and likewise initiated and continued a malicious prosecution, without probable cause, against him, which was ultimately determined in Plaintiff's favor, and published or caused to be published false and defamatory statements concerning the Plaintiff. These actions directly and proximately caused the injuries and damages to Plaintiff as claimed above, and are actionable under Illinois and common law.

WHEREFORE, Plaintiff Buckley prays for damages in the amount of $5,000,000 in actual and compensatory damages, jointly and severally, against each and every named Defendant except the County of DuPage and Defendant Burandt, plus punitive damages in the amount of $3,000,000 against each of these same Defendants, plus costs, attorneys fees and whatever additional relief this Court deems equitable and just.

COUNT IV

(Pendent Claim for Intentional Infliction of Emotional Distress under Illinois law)

90) Plaintiff realleges paragraphs 1-84.

91) The arrest, imprisonment, prosecution, and defamation of Plaintiff Stephen Buckley, as set forth above,

were done recklessly, intentionally or with gross negligence, and directly and proximately inflicted emotional distress upon Plaintiff, in violation of Illinois and common law.

WHEREFORE, Plaintiff Stephen Buckley prays for damages in the amount of $5,000,000 in actual or compensatory damages for each of them, jointly and severally, against all named Defendants except Defendants DuPage County and Burandt, plus punitive damages in the amount of $3,000,000 for each of them against these same Defendants, plus attorneys fees.

COUNT V

(Conspiracy to falsely arrest, imprison and maliciously prosecute, intentionally inflict emotional distress and defame under Illinois law)

92) Plaintiff realleges paragraphs 1-91.

93) The conspirac(ies) as alleged in Count I above also constitutioned [sic] conspirac(ies)/joint action(s) to falsely arrest, imprisoned, maliciously prosecute, intentionally inflict emotional distress, and defame Plaintiff Stephen Buckley, under Illinois and common law, proximately causing injury and damages to him as alleged above.

COUNT VI

(Pendent *respondeat superior* claim under state law)

94) Plaintiff realleges paragraphs 1-93.

95) The individual Defendants named above, were, at all relevant times, employees and agents of the Defendant County of DuPage, were acting within the scope of their employment, and their acts and omissions, as alleged in Counts III, IV and V, are therefore directly chargeable to the County under state law by *respondeat superior.*

Wherefore, Plaintiff Stephen Buckley prays for damage in the amount of $5,000,000 in actual and compensatory damages jointly and severally, plus punitive damages in the amount of $3,000,000 against the Defendant County of DuPage, plus costs, attorneys fees, and whatever additional relief this Court deems equitable and just.

PLAINTIFF DEMANDS TRIAL BY JURY.

Respectfully submitted,

Dated: July 27, 1988

/s/ G. Flint Taylor
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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

(Caption Omitted In Printing)

MEMORANDUM OPINION AND ORDER

(June 9, 1989)

Plaintiff's six-count complaint is brought under the Civil Rights Act, 42 U.S.C. § 1983, and includes various pendent state claims, arising from plaintiff's arrest and subsequent prosecution for the murder of eleven-year old Jeanine Nicarico ("Nicarico") on February 25, 1983. Plaintiff sues the County of DuPage, Sheriff Richard Doria ("Doria") and several of his deputies, State's Attorney James Ryan ("Ryan"), former State's Attorney J. Michael Fitzsimmons ("Fitzsimmons"), several Assistant State's Attorneys, and three expert witnesses who testified during plaintiff's prosecution. The claims include false arrest and imprisonment, malicious prosecution, defamation, and the denial of plaintiff's (1) right to a fair trial; (2) right to counsel; and (3) right to silence. In addition, plaintiff alleges that each defendant conspired to violate his constitutional rights.

On August 19, 1988 an answer denying the allegations of illegal and unconstitutional conduct was filed on behalf of Doria and all Sheriff's deputies.

The defendant State's Attorneys as well as the state's so-called "expert witnesses" have moved to dismiss on the ground of absolute privilege. In the alternative they move to dismiss on the ground of qualified privilege. The County of DuPage has moved to dismiss the *Monell* policy claim against it on the basis that it cannot legally be

responsible for the policies, practices and customs of either the County Sheriff or the State's Attorney.

FACTS[1]

On February 25, 1983, eleven-year old Nicarico was abducted from her home in Naperville, Illinois, sexually abused and murdered. Her body was found a few days later along the Prairie Path in DuPage County. (¶19)

An intensive investigation into the murder was commenced by the DuPage County Sheriff's office and the DuPage County State's Attorney's office, under the direction and responsibility of defendant Sheriff Doria and defendant State's Attorney Fitzsimmons, respectively. (¶20)

Ever since the abduction there has been extensive publicity about and interest in the Nicarico case which, in DuPage County at least, has engendered intense emotions in the community. This climate exerted great public pressure upon defendants to find someone to charge and prosecute for this heinous crime. (¶21)

In the early stages of the investigation a bootprint was discovered on the door of the Nicarico home. Sheriff's detectives concluded that it was left by the killer when he kicked in the door. At approximately the same time a mentally disturbed and totally incredible person, Alex Hernandez ("Hernandez"), allegedly told Sheriff's detectives that plaintiff Stephen Buckley ("Buckley") was

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[1] The facts are taken from the complaint and are referenced by paragraph ("¶ ___").

present for a post-murder conversation in which the murder was discussed. (¶22)

On that basis Sheriff's detectives went to plaintiff's home and questioned plaintiff without a lawyer. He denied any knowledge of the crime and voluntarily produced his boots. At about the same time a description of a person allegedly seen in the area of the Nicarico home on the afternoon of the abduction, and an FBI composite sketch drawn from the description, was supplied the defendants. The description and sketch were dissimilar to plaintiff. (¶23)

At the direction of defendant Sheriff Doria, John Gorayczyk ("Gorayczyk"), the sergeant in charge of the identification section of the DuPage County Crime Lab, made a comparative examination of plaintiff's boots with the bootprint on the Nicarico door and concluded that they did not match. (¶24)

Gorayczyk confirmed his conclusion with the head of the DuPage County Crime Lab and immediately communicated it, *inter alia*, to defendants Doria, Robert Soucek ("Soucek"), James Burandt ("Burandt") and Donald Schmitt ("Schmitt"). These conclusions became general knowledge among all of the Sheriff's police defendants and, either at the time of subsequent thereto, were made known to defendants Fitzsimmons, Thomas Knight ("Knight") and Patrick King ("King"). (¶25)

Defendant Doria then caused the boots to be removed from Gorayczyk's custody before he could complete his tests and write a report, and Doria sent them to defendant Edward German ("German") of the Illinois

Department of Law Enforcement Crime Lab for examination. (¶26)

Defendant German examined the boots and at first concluded in handwritten notes that plaintiff's boot "could have at best" made the footprint on the door and that "another shoe could very well have made the prints." In his official report he simply concluded that plaintiff's boot "could have" made the prints and omitted the remainder of his prior conclusions. His report and his notes were sent to defendant Burandt and the contents were shared with the Sheriff, the State's Attorney, and their defendant-subordinates. (¶27)

Defendant Knight and various other defendants, including Doria, Fitzsimmons and Burandt, apparently not satisfied with defendant German's conclusions, contacted anthropologist Louise Robbins ("Robbins") and defendant Olsen of the Kansas Bureau of Identification Crime Lab in search of a positive boot identification. (¶28)

Defendant Olsen, after reviewing defendant German's notes and report, and without the benefit of the boot itself, concluded that plaintiff's boot and the Nicarico bootprint had some "similar class characteristics, but the paucity of sufficient similar individual characteristics precluded a positive identification." (¶29)

Defendant Olsen reduced these findings to report which was sent, along with German's report and notes, to defendants Knight and German. Defendant Knight shared Olsen's conclusions with defendant Burandt and with various other defendants, including Fitzsimmons,

King, Doria, Soucek and Warren Wilkosz ("Wilkosz"). (¶30)

Confronted with three different expert reports which failed to match plaintiff's boot with the footprint on the door, defendants, including Knight, Burandt and German, procured their "positive identification" from Robbins, whose theories and reputation in the forensic community were generally discredited and viewed with great skepticism, a fact these defendants knew or should have known. (¶31)

Defendants Knight and King were involved with the Sheriff's police in all the early stages of their investigation, including the interrogation of witnesses and potential suspects. Specifically, Sheriff's detectives, including defendants Wilkosz and Dennis Kurzawa ("Kurzawa"), at the direction and under the supervision and sometimes in the presence and with the assistance of defendants Knight, King, Soucek and Kenneth Lepic ("Lepic"), repeatedly interrogated alleged suspects, including plaintiff Buckley and Hernandez, who were not represented by counsel. Despite intense pressure and intimidation, plaintiff Buckley steadfastly maintained his innocence and demonstrated no knowledge of the crime, while Hernandez told such wild and palpably false stories that his mental instability was obvious to defendants. (¶32)

As a result of these interrogations, at least one experienced Sheriff's detective who participated, concluded that Buckley and Hernandez were not involved in the Nicarico crime. This conclusion was buttressed by his general knowledge of the bootprint "evidence." (¶33)

He repeatedly communicated his conclusion and its basis to the defendants named herein, including defendants Doria, Knight, King, Soucek, Lepic and Wilkosz. (¶34)

Unable to solve the case, defendants Doria, Fitzsimmons, Knight and King convened a special DuPage County "investigative" grand jury, devoted solely to investigating the Nicarico case. (¶35)

Defendants Knight, King, Doria, Soucek, Lepic and Wilkosz, with the knowledge and approval of defendant Fitzsimmons, used the grand jury as an investigative tool, *inter alia*, by further interrogating, intimidating and badgering potential suspects, including plaintiff, when they were called before it without counsel. Despite this utilization of unabashedly strong-armed interrogation techniques by defendant Knight, plaintiff Buckley continued to maintain his innocence before the grand jury and again demonstrated no knowledge of the crime. (¶36)

Defendants Knight, King, Wilkosz and Burandt, with the knowledge of defendants Fitzsimmons, Doria, Soucek and Lepic, further abused the grand jury process by presenting only the "favorable" portions of the boot evidence while intentionally withholding Gorayczyk's findings, as well as misrepresenting Olsen and German's conclusions. (¶37)

Moreover, they presented a large amount of obviously incredible, irrelevant, false and contradictory hearsay and double hearsay evidence designed to improperly prejudice the plaintiff and other suspects before the grand jury. (¶38)

Defendants, including Doria, Soucek, Lepic, Knight, King and Wilkosz, also offered reward money, which induced suspect Hernandez to make further false, inculpatory statements in pursuit of the money; those statements were placed before the grand jury despite the fact that they were independently shown to be false and completely unreliable by further investigation. (¶39)

Those defendants, including defendants Thomas Vosburgh and Knight, also interrogated another suspect, Rolando Cruz ("Cruz"), without counsel and gave him financial payments and a rent-free apartment in exchange for inculpatory testimony, which was also placed before the grand jury despite its obvious lack of credibility. (¶40)

Despite this unremitting abuse of the grand jury process, and after more than eight months of "evidence" and over one hundred witnesses presented to the grand jury, defendant Fitzsimmons publicly admitted on January 27, 1984 that there was insufficient evidence to indict or prosecute. This was four months *after* the bootprint evidence had been presented to the grand jury. (¶41)

On March 9, 1984, twelve days before the Republican primary election in which defendant Fitzsimmons was facing the challenge of defendant Ryan, defendants Fitzsimmons, Knight, King and Doria obtained grand jury indictments for murder, rape and burglary against plaintiff Buckley, Hernandez and Cruz. No new evidence of importance was presented after January 27th. (¶42)

The indictments were obtained despite the absence of probable cause in order to defuse public pressure, to

cover up their inability to solve the crime, to aid defendant Fitzsimmons in his political campaign, and to further coerce plaintiff and his co-indictees to reveal information about the crime and/or falsely inculpate themselves or each other. (¶43)

Defendant Fitzsimmons publicly announced the indictments, falsely asserting that numerous pieces of evidence, including the bootprint evidence, led to the conclusion that plaintiff and his co-indictees, along with some other unindicated suspects, were part of a burglary ring who committed the Nicarico crime. He released "mug shots" of plaintiff and his co-indictees to the media which were prominently and repeatedly displayed on television and in the newspapers. (¶44)

These false and prejudicial statements inflamed the populace of DuPage County against plaintiff and his co-indictees. (¶45)

Defendants, at the direction of defendants Doria, Knight and Soucek, then arrested and imprisoned plaintiff Buckley and his co-indictees on three million dollars bond, and defendants Knight, King and various defendant Sheriff's detectives again interrogated them, offering them grace from the death penalty if they made false admissions or bore false witness against their co-defendants. (¶46)

Plaintiff Buckley continued to maintain his innocence and to deny knowledge of the murder, while co-defendant Hernandez retracted his prior "admissions" while being interrogated by defendants Knight and King, stating that he had made them in an attempt to obtain the reward money offered by defendants. (¶47)

These post-indictment interrogations further reinforced the conclusion that plaintiff and his co-indictees were not involved in the Nicarico murder and this fact was repeatedly reasserted to defendants, including Doria, Soucek, Knight and King, by the same Sheriff's detective who has previously done so. (¶48)

Defendants continued to ignore this detective's conclusions and after he pursued a lead concerning another *Nicarico* suspect he was removed from the Nicarico investigation and given unfavorable statements, compelling him to resign from the force. The head of the DuPage County Crime Lab was forced to resign for similar reasons. (¶49)

Defendants, including Knight, King, Doria, Soucek, Burandt and Lepic, secreted the Gorayczyk boot evidence from plaintiff and his defense layers, who only discovered this information by independent investigation on the eve of trial. (¶50)

In March of 1984 defendant Ryan defeated defendant Fitzsimmons in the Republican primary for DuPage County State's Attorney, and in November of 1984 Ryan won the general election. (¶51)

In December of 1984 defendant Ryan assumed the duties of DuPage County State's Attorney, appointed defendant Knight as the special Nicarico case prosecutor, and approved and authorized the continued imprisonment and prosecution of plaintiff and his co-indictees. (¶52)

Defendants, including defendants Knight, Doria, Burandt, German, Olsen, Schmitt and Robbins, continued

to construct and shape their boot "evidence," which was designed to falsely implicate plaintiff despite all the contrary evidence which demonstrated that his boot did not make the print on the Nicarico door and which otherwise established that he was not involved in the crime. (¶53)

In January of 1985 defendants Knight and King, with the approval and under the supervision of defendants Ryan and Robert Kilander ("Kilander"), proceeded to select a jury and jointly try plaintiff and his co-defendants in a highly prejudicial and inflamed atmosphere, occasioned at least in part by public statements made and/or prompted by defendants. (¶54)

At trial defendant prosecutors presented as the cornerstone of their case against plaintiff, manufactured boot "evidence" through defendants Robbins, German, Schmitt and Olsen, who presented false opinions which, in the case of Olsen and German, were significantly at variance from their original reports and notes. (¶55)

At trial defendant prosecutors also presented the false inculpatory statements of plaintiff's co-defendants which had been obtained by defendants' coercive interrogations, promises or rewards, and other financial inducements. (¶56)

Despite this highly charged and prejudicial atmosphere and the presentation of this manufactured and unfairly prejudicial evidence, the jury, while convicting plaintiff's co-defendants, were hung as to plaintiff's guilt or innocence and the court declared a mistrial. (¶57)

Nonetheless, defendants, including Ryan, Kilander, Doria, Soucek, Knight and King, immediately decided to

continue plaintiff's imprisonment and to re-try him. Defendant Knight publicly announced this decision directly after the verdicts were returned and it was widely reported in the media. (¶58)

Defendant Fitzsimmons made additional post-trial statements which were published in which he falsely claimed that plaintiff was guilty of raping and killing Nicarico, while defendant State's Attorneys and Sheriff's police, including Knight and Doria, continued to make prejudicial public statements and to manipulate the press coverage, *inter alia*, prompting the Nicarico family and friends to make inflammatory public statements that plaintiff was guilty of the crime. (¶59)

In June of 1985 Brian Dugan ("Dugan"), of Aurora, Illinois, was charged with several sexual assaults in Kane County, and on June 25, 1985 with the murder and rape of seven-year old Melissa Ackerman ("Ackerman") of LaSalle County. Defendants were immediately put on notice by the recently resigned Sheriff's detective that they should investigate Dugan as a potential suspect in the Nicarico murder because of the similarities between the two crimes. (¶60)

Within a week Dugan admitted to his public defender that he had not only murdered and raped Ackerman but also that he murdered and raped Nicarico and a woman named Donna Schnnor. The public defender then took a detailed statement from Dugan concerning the Nicarico murder. (¶61)

In November of 1985 the details of Dugan's Nicarico confession, which included the fact that he acted alone and details which had not been publicly revealed and

could only be known to the murderer, were conveyed to defendants Knight and Kilander, and then to the other defendants, including Ryan, Doria, Soucek and Lepic. (¶62)

Dugan's attorney proposed that Dugan would plead guilty to these three murders and rapes in exchange for life sentences; the Kane and LaSalle County prosecutors accepted, but the DuPage County defendants, including Ryan, Doria, Knight, Kilnder, Soucek and Lepic, refused and instead again decided to continue plaintiff's arrest, imprisonment and re-prosecution. (¶63)

They persisted in this decision even after Dugan passed a December 1985 polygraph test in which he repeated his admission that he alone committed the Nicarico murder, and again after he gave a detailed videotaped confession while under hypnosis later the same month. (¶64)

Furthermore, defendant Knight made false and misleading statements which were published in the media and which were designed to discredit Dugan's confession, to further prejudice plaintiff, and to justify his continued arrest, imprisonment and prosecution. (¶65)

In June of 1986 plaintiff's defense lawyers presented additional evidence – the conclusion of a highly respected FBI footprint expert that Buckley's shoe did not make the Nicarico bootprint – defendants but they nonetheless continued the arrest, imprisonment and prosecution of plaintiff and opposed the lowering of plaintiff's bond from three million dollars. (¶66)

In September of 1986 defendant Kilander interrogated a DuPage County prisoner who allegedly told him that plaintiff had made a highly inculpatory statement to him. (¶67)

On September 19, 1986, during jury selection for plaintiff's retrial, defendants Knight and Kilander informed the court of this purported statement and as a result plaintiff's trial was aborted. The statement appeared in the media the next week and shortly thereafter plaintiff's lawyers established that it was physically impossible for plaintiff to have made the statement, and further, the prisoner denied telling Kilander that plaintiff had made the statement. (¶68)

In January of 1987 defendants sought another continuance in plaintiff's retrial, claiming that their anthropologist "expert," Robbins, was seriously ill and although able to testify could not travel from her North Carolina home. (¶69)

Fearing that Robbins was terminally ill, plaintiff's defense lawyers sought a video-taped examination for her use at the trial but defendants opposed this request and it was denied. (¶70)

Robbins died a short time later, and in March of 1987 defendants dismissed plaintiff's prosecution and terminated his arrest and imprisonment, three years after plaintiff was arrested. (¶71)

Defendants, including defendants Ryan, Doria, Knight, Kilander, King, Soucek and Lepic, decided to use the pretext of Robbins' death to publicly explain the dismissal rather than to admit that plaintiff was innocent

of the Nicarico murder and that they had arrested, imprisoned and prosecuted the wrong men. (¶72)

This pretextual reason was asserted publicly by these defendants and widely reported by the media. (¶73).

Defendants to this day still refuse to admit that they arrested, imprisoned and prosecuted the wrong men, and in furtherance of this continued cover up have refused to dismiss the case against plaintiff's co-defendants, who were sentenced to death plus two hundred twenty-five years, and who they are now re-prosecuting after their convictions were reversed on appeal. (¶74)

Plaintiff has a continuing and unremitting fear that defendants will re-arrest, re-imprison and re-prosecute him for the Nicarico murder despite his clear innocence, particularly in retribution for his filing and pursuing this lawsuit. (¶75)

DISCUSSION

I. The State's Attorneys' Motion

The complaint indicates that the murder of eleven year old Nicarico and the subsequent indictment of plaintiff occurred during the term of office of former State's Attorney Fitzsimmons. In March of 1984 Fitzsimmons was defeated in the Republican primary by the current State's Attorney Ryan, who succeeded him has State's Attorney when his term concluded in December of 1984. Kilander served as Ryan's first Assistant State's Attorney during his term and Assistant State's Attorneys Knight and King served in the Fitzsimmons administration as well as the Ryan administration. The defendant State's

Attorneys (collectively "State's Attorneys") are sued in both their official and individual capacities. Fitzsimmons, Knight and King all were allegedly involved in pre-indictment stages of the investigation and Ryan, Kilander, Knight and King were involved in the trial and post-trial stages.

The State's Attorneys are variously[2] charged with: (1) conspiring with sheriff's deputies and certain expert witnesses to manufacture bootprint evidence designed to implicate plaintiff; (2) the conduct of coercive interrogation in order to obtain evidence against plaintiff; (3) convening of a special investigative grand jury for the same purpose; (4) bribery of two suspects with reward money and other financial considerations to make false and culpatory statements about plaintiff; (5) the obtaining of indictments from the special investigative grand jury in order to pressure certain defendants into making inculpatory testimony against plaintiff; (6) the generation of false and highly prejudicial publicity; (7) making post-trial inflammatory statements; (8) the manufacture of false and inculpatory statements post-trial; and (9) engagement of a cover up rather than admitting plaintiff was innocent of the murder. Plaintiff contends that these specific acts were done to prejudice and defame plaintiff, to cover up defendants' failure to solve the crime, to cover up the arrest, imprisonment and prosecution of the

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[2] Of the various charges that are set forth immediately following, it would appear that Fitzsimmons, Kilander, Knight and King are charged with numbers (1) through (6) and Ryan, Knight and King are charged with (7) through (9).

wrong man, and to further defendant Fitzsimmons' political career, and in so doing defendants allegedly violated plaintiff's rights to due process and fair trial by causing the jury to deadlock rather than to acquit which in turn caused him to be incarcerated for an additional two years.

The discussion of prosecutorial immunity must start of course with *Imbler v. Pachtman*, 424 U.S. 409, 96 S.Ct. 984, which established that a prosecutor is absolutely immune from a suit for damages under 42 U.S.C. §1983 for alleged violation of constitutional rights committed in "initiating a prosecution and in presenting the state's case." The court distinguished those functions "imminently associated with the judicial phase of the criminal process" from those which were more closely associated with investigative "police work" or administrative duties, the latter being subject to only qualified immunity. The court recognized that prosecutors were advocates for the state and therefore should not have to defend prosecutorial mistakes. The immunity was held not to depend upon the defendant's status as a prosecutor but upon the "functional nature of the activities of which a plaintiff complains." *Id.*, 430, 96 S.Ct. at 994. Improper motivation such as malice, vindictiveness or self interest are irrelevant in assessing immunity, as are allegations of abusive, illegal or unethical conduct. *Id.*

Because *Imbler* involved post-indictment activities the question of whether the evidence-analyzing and case preparation functions performed by a prosecutor before the actual filing of an information or indictment or before a grand jury constituted prosecutorial or investigative functions was left open. *Imbler*, 424 U.S. at 431 n.33, 96

S.Ct. at 995 n.33. Circuit courts have, subsequent to *Imbler*, declined to establish a bright line commencement of proceedings test and have applied absolute immunity to many acts of prosecutors that have occurred prior to indictment. *See* e.g., *Barbera v. Smith*, 836 F.2d 96, 100 (2nd Cir. 1987); *Powers v. Coe*, 728 F.2d 97, 104 (2nd Cir. 1983). The Second Circuit has divided pre-litigation functions into at least two categories: first, the supervision of and interaction with law enforcement agencies in acquiring evidence which might be used in a prosecution, and second, the organization, evaluation and marshaling of this evidence into a form that will enable the prosecutor to decide whether to seek a warrant, indictment, or go to trial. The former was believed to be of a police nature and the latter prosecutorial. *Barbera v. Smith*, 836 F.2d at 100.

Other acts held to be encompassed within the protected prosecutorial function which occurred prior to indictment include instituting the termination of parental rights even if allegedly without notice, *Martin v. Aubuchon*, 623 F.2d 1282, 1285 (8th Cir. 1980); procuring a warrant for the arrest of a charged defendant, *Lerwill v. Joslin*, 712 F.2d 435, 438 (10th Cir. 1983), and in advocating a particular level of bail, *id.* at 438, 439; activities in the plea bargaining context despite misrepresentation, *Taylor v. Kavanaugh*, 640 F.2d 450, 453 (2nd Cir. 1981); intimidating plaintiff in dismissing a damage suit in exchange for dismissing of criminal charges, *McGruder v. Necaise*, 733 F.2d 1146, 1148 (5th Cir. 1984); providing advice to law enforcement officials concerning the existence of probable cause and the legality of arrests, *Myers v. Morris*, 810 F.2d 1437, 1446 (8th Cir. 1987).

Pre-indictment interrogation of witnesses or securing of evidence by other means, when performed by a prosecutor, has been recognized in a variety of circumstances as being inherent in the decision whether to initiate a prosecution or as pre-trial preparation and thus qualify for absolute immunity. *Myers* at p.1449; *Forsyth v. Kleindienst*, 599 F.2d 1203 (3rd Cir. 1979), *cert. denied*, 453 U.S. 913, 101 S.Ct. 3147 (1981); *Demery v. Kupperman*, 735 F.2d 1139 (9th Cir. 1984), *cert. denied*, 469 U.S. 1127, 105 S.Ct. 810 (1985) (conferring with potential witnesses for the purpose of deciding whether to file a charge); *Lee v. Willins*, 617 F.2d 320, 322 (2nd Cir. 1980), *cert. denied*, 449 U.S. 861, 101 S.Ct. 165 (1980) (coercion of false testimony leading to indictment, the reasoning being that the same injurious result from the decision to prosecute must flow from the initiation of criminal proceedings); *Atkins v. Lanning*, 556 F.2d 485 (10th Cir. 1977) (investigative case preparation can be regarded as an integral component of case presentation); *Demery v. Kupperman*, 735 F.2d at 1144 ("conferring with potential witnesses regarding their knowledge of underlying events is plainly part of a prosecutor's preparation of his case" and therefore immune); *Cook v. Houston Post*, 616 F.2d 791, 793 (5th Cir. 1980) (interviewing witnesses before presenting their testimony to a grand jury).

On the other hand, it has been held that when a prosecutor participates in ferreting out crime and is called upon to make the decisions similar to those that a policeman makes, he is functioning in an analogous role to that of a policeman. Accordingly, he is entitled to only the qualified immunity which the Supreme Court has determined to be sufficient to preserve the ability of

police officers to function effectively. See *Pierson v. Ray*, 386 U.S. 547, 87 S.Ct. 1213 (1966). Thus when a prosecutor participates in a search and seizure mission he has been held to be entitled to only qualified immunity. *Hampton v. Hanrahan*, 600 F.2d 600 (7th Cir. 1979); *see* also *Marrero v. Hialeah*, 625 F.2d 499 (5th Cir. 1980). Failure of an investigative prosecutor to provide witness protection to a cooperating individual in the course of a fraud investigation only entitled the prosecutor to qualified immunity when the government had not yet engaged in the process of prosecuting a criminal defendant. The record revealed that complained-of acts occurred a full five months before an arrest warrant was issued and six months before an indictment was returned. *Barbara v. Smith, supra.* Participation in an illegal search and seizure only entitled a prosecutor to qualified immunity. *McSurely v. McClellan*, 697 F.2d at 319-20. Sending a defamatory letter to the legislature after all criminal proceedings had terminated was considered administrative and only entitled to qualified immunity *Walker v. Cahalan*, 542 F.2d at 684-85.

We now turn to an analysis of plaintiff's allegations against the State's Attorneys within this legal framework.

A. Bootprint Evidence

According to the complaint, in the early stages of the investigation a bootprint was discovered on the door of the Nicarico home which the sheriff's detectives concluded was left by the killer. At approximately the same time the police were informed by one Hernandez that plaintiff was present for a post-murder conversation in which the murder was discussed. Plaintiff voluntarily

produced his boots for a comparison examination by the DuPage County Crime Lab which concluded that they did not match the bootprint. This conclusion was communicated to defendants Fitzsimmons, Knight and King. The Sheriff then sent the boots to the Illinois Department of Law Enforcement Crime Lab for examination where it was concluded that plaintiff's boot could have made the footprint. This report was shared with the State's Attorney. Knight and Fitzsimmons and various other defendants contacted defendant Olsen of the Kansas Bureau of Identification Crime Lab and anthropologist Robbins to conduct additional testing. Olsen concluded that although the boot and bootprint had similar class characteristics they were insufficient to allow a positive identification. Defendant Robbins however was able to make a "positive identification." Robbins, according to the complaint, was reviewed in the forensic community with great skepticism which the defendants "knew or should have known."

It appears therefore from this recitation of allegations that at the time of these activities complained of plaintiff had been connected to the crime scene by Hernandez independently of the boot evidence so that the purpose of the development of the boot evidence was to corroborate the information supplied by Hernandez, who is described in the complaint as being "a mentally disturbed and totally incredible person."[3]

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[3] If it was "obvious" there would be all the more reason to seek corroboration.

The question is whether under these circumstances the efforts by the State's Attorneys to obtain definitive boot evidence linking plaintiff to the Nicarico murder was in the nature of acquisition of evidence or in the nature of evaluation of evidence for the purpose of initiating the criminal process. *Barbara*, 836 F.2d at 100. Since the bootprint and the boots were obtained prior to involvement by the State's Attorneys, it appears that their work was more in the nature of evaluative rather than acquisitive work. At the particular point they got involved plaintiff had already been fingered by Hernandez. The bootprint and plaintiff's boots had already been obtained by the Sheriff. The securing of expert testimony is not securing evidence but securing opinions as to the value and relevance of existing evidence to see if it could be admissible and evidence in a subsequent proceeding before a grand jury or at trial. Thus the work was more associated with the evaluative judicial phase rather than the acquisitive investigative phase. *Id.* Accordingly, the court finds that the State's Attorneys are entitled to absolute immunity for their involvement with the boot evidence.

B. Special Investigative Grand Jury

The complaint charges that the State's Attorneys convened a special DuPage County "investigative" grand jury solely for the purposes of the Nicarico case. It is charged that it was used as an investigative tool whereby witnesses, including plaintiff, were interrogated, intimidated, and badgered and where only the favorable portions of the boot evidence were admitted, with the

unfavorable portion intentionally withheld. Other incredible, irrelevant, false and contradictory hearsay, and double hearsay, evidence designed to prejudice plaintiff was placed before the grand jury. The State's Attorneys also offered reward money to bribe Hernandez to make further false inculpatory statements to be presented to the grant jury. Indictments were subsequently obtained of plaintiff as well as others, the purpose of which was alleged to be in furtherance of the re-election prospects of State's Attorney Fitzsimmons, who was being challenged by defendant Ryan.

The case law, with one exception cited by plaintiff (*Briggs v. Goodwin*, 569 F.2d 10 (D.C.Cir. 1977), *cert. denied*, 437 U.S. 904, 98 S.Ct. 3089 (1978)), regards as well settled that presentation of evidence to a grand jury falls within the scope of advocatory prosecutorial conduct protected by absolute immunity. As stated in *Gray v. Bell*, 712 F.2d 490 (D.C.Cir. 1983):

> "Participation in grand jury proceedings is a vital and customary part of a prosecutor's duties. At least in those instances where an indictment is returned, it can safely be said that such if not all of a prosecutor's conduct in presenting the evidence to a grand jury will reflect traditional advocacy directed to securing an indictment."

Briggs v. Goodwin, a 1977 decision of the same circuit as *Gray*, is the only case that distinguishes between so-called "investigative" grand juries and "indicting" grand juries. *Briggs* was a Section 1983 claim based upon allegations that a special prosecutor conducting a grand jury investigation of an anti-war organization knowingly gave false

testimony during a hearing on a related motion in district court. The prosecutor had been directed by the court to disclose any government agents or informers among the witnesses subpoenaed before the grand jury. The *Briggs* court held that the prosecutor's actions were more investigative than prosecutorial. The court attached great importance to the fact that the grand jury had been convened to determine whether a crime had been committed, if so, its precise nature, and the identity of individuals to whom criminal liability might attach. *Briggs* is therefore as distinguishable here as it was in *Gray*; where precise crimes had already been identified and certain individuals had been identified as targets.[4] The court finds that the grand jury here was substantially dissimilar to the grand jury in *Briggs* so that whatever precedential value *Briggs* may currently have is irrelevant. *Gray*, 712 F.2d at 503. Therefore absolute immunity attaches to all allegations of prosecutorial misconduct related to the grand jury proceedings.

C. Post-Indictment, Pre-Trial and Trial Activities

The complaint charges that the State's Attorneys, after the indictment was handed down and prior to trial, constructed and shaped the boot evidence and secreted exculpatory boot evidence from plaintiff's defense lawyer until the eve of trial. The complaint further charges the State's Attorneys with presenting the manufactured boot evidence as the cornerstone of their case against plaintiff

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[4] The same circuit that decided *Briggs*, in its later decision in *Gray*, noted that its previous decision in *Briggs* had been met with generally unfavorable comment. *Gray*, 712 F.2d 503 n.38.

as well as the presentation of false and inculpatory statements of plaintiff's co-defendants obtained from coercive interrogations, promises, or rewards and other financial inducements.

It is clear that these allegations of prosecutory misconduct are absolutely privileged under *Imbler v. Pachtman*, 424 U.S. 493, 96 S.Ct. 984 (1974). *Imbler* involved precisely the same types of allegations.

D. Post-Trial Activities

The complaint alleges that plaintiff's original criminal trial ended in a hung jury. The State's Attorneys then proceeded to announce that they planned to continue plaintiff's imprisonment[5] and to retry him. They persisted in this decision to continue his arrest, imprisonment and re-prosecution in spite of the fact that subsequent to the mistrial another individual confessed to the crime and claimed to have acted alone. The prosecution and imprisonment was continued until March of 1987 when all of the charges against plaintiff were dismissed allegedly as the result of the death of Robbins, the prosecution's expert witness who tied the boot evidence to plaintiff.

It is clear that these activities were incurred as a result of the State's Attorneys' decision to retry the plaintiff. The original indictment still stood and the case continued against plaintiff in spite of the mistrial and could only be terminated by order of court. The decision as to

[5] Through an extremely high bond.

when to prosecute is preeminently that of the State's Attorneys and is "at the heart of the holding in *Imbler*", *Grant v. Hollenbach*, 870 F.2d 1135, 1138 (6th Cir. 1989). Accordingly, the State's Attorneys are entitled to absolute immunity for these post-trial activities.

E. Public Statements by the Prosecutors

The complaint alleges that both pre- and post-trial false and misleading statements were made by the State's Attorneys which were designed to prejudice plaintiff and to justify his continued arrest, imprisonment and prosecution. These statements included claims that plaintiff was guilty of raping and killing Nicarico.

Plaintiff argues that *Hampton v. Hanrahan* and *Powers v. Coe* make it clear that public statements by prosecutors are not protected by absolute immunity because they are administrative rather than prosecutorial. Therefore plaintiff claims defendants' publicity campaign which repeatedly and falsely asserted plaintiff's guilt, falsely linked him to a burglary ring, and publicly attempted to discredit the confession of the man who confessed to committing the crime, is not protected by prosecutorial immunity.

While it is true that only qualified immunity is available to shield a prosecutor's public statements in a Section 1983 suit, the conduct to be actionable must amount to a deprivation of a constitutional right. *Powers v. Coe*, 728 F.2d at 105. Violations of state law alone are insufficient to state a claim for Section 1983 relief. Injuries to reputation and emotional distress caused by prosecutorial public statements are violations of state law and do not

implicate the constitution. *Geter v. Fortenberry,* 849 F.2d 1550, 1557 (5th Cir. 1988); *Coen v. Runner,* 854 F.2d 374, 378-79 (10th Cir. 1988).

However plaintiff also charges that these public statements furthered "his false arrest, imprisonment and prosecution." While false arrest and imprisonment which implicate the Fourth Amendment qualify as a basis for a Section 1983 suit, the prosecutors' public statements must be a proximate cause to be actionable. If the State's Attorneys cannot be sued for advice leading to an arrest (*Myers v. Morris, supra*) or indictment (*Lee v. Willins, supra*) or pre-trial detention (*Lerwello v. Joslin, supra*), his public statements justifying these actions could hardly be the basis for arrest, imprisonment or prosecution. If the State's Attorneys are immune for their actions leading to arrest, imprisonment and prosecution even though their motive was improper, their statements and justifications for taking these actions, though perhaps evidence of motive, cannot themselves be actionable because motives are irrelevant in this inquiry. (*Inman,* 424 U.S. at 995 n.34, 96 S. Ct. at 995 n.34)[6]

Thus, the only federal right legitimately implicated stems from plaintiff's claim that some of these statements had the design and effect of unfairly prejudicing him before the jury. It cannot be said at the pleading stage that the alleged pre-trial publicity could not have influenced some of the jurors so as to cause the jury to hang rather

[6] A public statement could cause another person to take an action based on that statement but it is difficult to see how a person's own statement could induce him to act.

than to acquit outright. However only one public statement allegedly made predated the jury trial, *viz,* State's Attorney Fitzsimmons' public announcement of the indictments and his summary of the evidence.[7] While defendants' argument as to why absolute immunity ought attach to such public statements is strong, the federal appellate cases deny absolute immunity to federal prosecutors for statements made at press conferences where a [sic] criminal indictments are announced. *Steepanian v. Addis,* 699 F.2d 1046, 1048 (11th Cir. 1983); *Marrero v. City of Hialeah,* 625 F.2d 499, 505-06 (5th Cir. 1980). Accordingly, all State's Attorneys are entitled to absolute immunity for their public statements except for Fitzsimmons who is not entitled to immunity for his announcement of the indictment.

F. Alleged Cover Up

Plaintiff contends that prosecutors are not immune from liability for actions taken to cover up their inability to solve the crime and the prosecution of the wrong person. Plaintiff cites three cases in support: *Ryland v. Shapiro,* 708 F.2d 967 (5th Cir. 1983); *Bell v. City of Milwaukee,* 514 F.Supp. 1363 (E.D. Wisc. 1981); *Hampton v. Hanrahan,* 600 F.2d 600 (7th Cir. 1979).

In *Ryland* prosecutors falsified a death certificate; in *Bell* in [sic] district attorney participated in a coroner's inquest in an effort to cover up a murder committed by a policeman; and in *Hampton* the prosecutor sought to cover up his part in an illegal raid of an apartment. A

[7] *See Plaintiff's Response* brief, p.11 note**.

common thread in these cases is that the deeds covered up will not themselves be entitled to absolute immunity because they all were committed while the prosecutor was acting outside prosecutorial function. The central point of *Imbler* is that the inquiry turns on this functional nature of the activity rather than the motive of the actor. *Imbler*, 424 U.S. at 419 n.13. Motivation is only relevant to the good faith defense of qualified immunity. Here the deeds allegedly covered up were themselves entitled to absolute immunity. Accordingly, it would make no sense to grant immunity to the acts themselves but to deny it to the cover up. *Jones v. Shanklin*, 800 F.2d 77, 80 (6th Cir. 1986). To hold otherwise would allow an artful pleader to circumvent *Inman* because every time a prosecutor denied improper motive for an immune activity he could be sued for covering up. Accordingly, the State's Attorneys are entitled to absolute immunity for these claims.

G. Plaintiff's Common Law Claim

Plaintiff also pleads pendent state common law causes of action for false imprisonment, malicious prosecution and intentional infliction of emotional distress. The prosecutors claim that they are entitled to absolute immunity for these claims arising out of the same set of operative facts upon which plaintiff bases his Section 1983 claim. The basis of the Supreme Court decision in *Imbler* is that prosecutors enjoy the same absolute immunity for liability under Section 1983 for prosecutorial misconduct as they did under common law as it existed at the time Section 1983 was enacted. *Imbler*, 424 U.S. at 423, 96 S.Ct. at 992, and the cases and material cited at

n.21. The common law immunity is well settled. Accordingly, the State's Attorneys are immune from liability for the pendent state law claims under Counts III, IV, V and VI.

CONCLUSION

The motion of the State's Attorneys to dismiss Count I (Section 1983) is granted as to defendants Ryan, Knight, Kilander and King, and granted as to defendant Fitzsimmons, with the exception of the claim under Count I based upon the claim of denial of constitutional right to a fair trial as a result of the pre-trial public announcements of defendant Fitzsimmons as described in paragraph 44 of the complaint. Counts III, IV, V and VI, as to Fitzsimmons, Ryan, Knight, Kilander and King are dismissed.

II. Motions to Dismiss Filed by German, Olsen and the Estate of Robbins ("expert witnesses")

The expert witnesses are sued by plaintiff under 42 U.S.C. §1983 and for various pendent state common law causes of action arising from plaintiff's arrest, indictment, and subsequent prosecution for the Nicarico murder. The expert witnesses each testified before the grand jury and at plaintiff's trial. Plaintiff claims that they each gave perjured testimony regarding the so-called boot evidence. Plaintiff's complaint also alleges in paragraph 80 that . . . "each defendant reached an understanding, engaged in a sequence of events or joint course of conduct and/or otherwise agreed and conspired together to violate the constitutional rights of plaintiff Buckley with

the mutual purpose, objective and/or knowledge that it would deprive him of said right."

The expert witnesses haved [sic] moved to dismiss contending that they are entitled to absolute immunity on all of these claims because the claims are based on their testimony before the grand and at trial, for which they are entitled to absolute immunity under *Briscoe v. LaHue*, 460 U.S. 325, 103 S.Ct. 1108. In *Briscoe* the Supreme Court held that Section 1983 did not abbrogate [sic] the absolute immunity existing at common law with respect to either private witnesses or witnesses testifying under color of law. Accordingly, the court held that a plaintiff who suffered constitutional injuries as a result of perjured testimony offered at trial could not recover against the perjuror [sic] under Section 1983. In doing so the court analogized the reason for granting witnesses immunity with the reasons for granting immunity to prosecutors. 460 U.S. 343, 103 S.Ct. at 1119. Although left an open question in *Briscoe*, the Seventh Circuit has extended witness immunity to those testifying before a grand jury. *Kincaid v. Eberle*, 712 F.2d 1023 (1983). Common law and Section 1983 immunity however only extends to the witness's testimonial function. The out of court conduct and investigative activities of a potential witness, even though the person later gives testimony in a judicial proceeding, is entitled only to qualified immunity. Otherwise, a police officer or other witness who violates the constitutional rights of another could immunize themself [sic] from these violations solely by appearing in court as a witness. *Jones v. City of Chicago*, 856 F.2d 985, 991, 993 (7th Cir. 1988). In *Jones* a laboratory technician employed by the City of Chicago conducted tests and typed semen

and blood reports but failed to include the information in her laboratory report that she prepared for the criminal proceeding. The court held that the jury was entitled to conclude that the lab technician deliberately withheld the information so that it could not be used in the defense of the plaintiff.

To the contrary here the three defendants examined evidence and prepared reports which were later changed, allegedly falsely, to implicate plaintiff. There are no allegations that the initial investigative work done by any of the experts was false; rather plaintiff alleges that the initial reports were accurate but that the later testimony of the witnesses was changed in order to substantiate a case against plaintiff. Therefore the net effect of these allegations is not that defendants initially falsified their investigations but that they falsified their testimony before the grand jury and at trial. This distinguishes this case from *Jones*: there the initial investigative acts were part of the conspiracy to railroad the plaintiff, Jones. *Jones*, 856 F.2d at 993. Here the testimonial acts of the witnesses were designed to railroad Buckley. This is a crucial distinction which entitles the expert witnesses to immunity.

Plaintiff also argues that a conspiracy including the expert witnesses existed among the defendants to violate the constitutional rights of plaintiff. To be liable as a conspirator a person must be a voluntary participant in a common venture for an illegal purpose. He must understand the general objectives of the scheme, accept them, and agree, either explicitly or implicitly, to do his part to further them. *Jones*, 856 F.2d at 992. However in order to support a conspiratorial theory a plaintiff would have to

allege non-privileged actions that would tie the expert witnesses into the conspiracy. *Martin v. Malhoyt*, 830 F.2d 237 (D.C.Cir. 1987). Here the complaint charges that the expert witnesses in their non-testimonial roles gave exculpatory information to the prosecution. This is certainly inconsistent with plaintiff's conspiratorial theory that these witnesses agreed to help inculpate the plaintiff. The misconduct complained of was the perjured testimony intended to inculpate plaintiff but these were entitled to immunity. Accordingly, the conspiratorial actions of the expert witnesses consisted of testimonial acts which are absolutely privileged either in suits directly against the witness or indirectly against the witness through a conspiracy theory. *Martin v. Malhoyt*, 830 F.2d 237, 258 n.57 (D.C.Cir. 1987) citing *Cooper v. O'Connor*, 99 F.2d 135, 142 (D.C.Cir. 1938), *cert. denied*, 305 U.S. 643, 59 S.Ct. 146 (1938).

A contrary holding would open the door to artful pleading of conspiracy in order to circumvent testimonial immunity. There appears to be no substantial justification to treat an agreement to perform an act to which absolute immunity attaches differently from the treatment of the individual act itself. "Accusing the defendants jointly or by way of a count of conspiracy gives plaintiff's case no more virtue than if he had proceeded against each defendant singlely." *Martin v. D.C. Metropolitan Police Dept.*, 812 F.2d 1425, 1429, citing *Cooper v. O'Connor*, F.2d 135, 142 (D.C.Cir. 1938).

Plaintiff's final argument seeks to distinguish a witness who is responsible for the initiation of the criminal proceeding, i.e., a complaining witness from a mere testimonial witness, citing *White v. Frank*, 855 F.2d 956 (2nd

Cir. 1988). While this argument (and *White*) seems to ignore the *Briscoe v. LeHue* principal [sic] that "immunity rests on functional categories [rather than] on the status of the defendant" (460 U.S. at 342), it is difficult to see here how any of the expert witnesses could be characterized as "complaining witnesses." In the prosecution of plaintiff all that the expert witnesses did was to evaluate certain evidence which was presented against plaintiff before the grand jury. The *White* court made this distinction because at common law in an action for malicious prosecution the person who initiated a baseless prosecution was not absolutely immune. *White*, 855 F.2d at 959, quoting *Malley v. Briggs*, 475 U.S. 335, 340, 106 S.Ct. 1092, 1096 (1986). A complaining witness however is described as "the party who made the complaint." *White*, 855 F.2d at 959, quoting *Hastings v. Lusk*, 22 Wuend 410, 417 (N.Y. 1839). Here there is no allegation that any of the expert witnesses had anything to do with the initial arrest or the complaint filed against plaintiff; rather the allegations charge the expert witnesses with giving false testimony that led to his indictment and a hung jury. Thus their testimony is privileged under *Briscoe* and *Kincaid*. Accordingly, the motions of the expert witnesses to dismiss all counts of the complaint directed against them are granted.

III. Motion of the County of DuPage to Dismiss

Plaintiff's *Monell* policy claim against the County of DuPage is based on the actions of the Sheriff of DuPage County and the State's Attorney of DuPage County as county policymakers. *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986).

A. Sheriff of DuPage County

The County of DuPage argues that the Supreme Court in *Pembaur* did not decide that the sheriff and the county prosecutor are final policymakers of the county *per se*, but, in deference to the interpretation and application of Ohio state law by the Sixth Circuit Court of Appeals, the elected officials were final policymakers as far as Hamilton County, Ohio was concerned. The Sixth Circuit considered relevant to its analysis that under Ohio law the sheriff is elected by the residents of the county; he serves as the chief law enforcement officer of the county; he submits his budget requests to the county board which in turn furnishes his office, books, furniture and other materials; his salary and all training expenses are paid out of the county general fund; and he is responsible for the neglect of duty or conduct of his deputies. It concluded that the sheriff's duties enumerated in the Ohio statutes clearly indicated that the sheriff could establish county policy in certain areas. *Pembaur v. City of Cincinnati*, 746 F.2d 337, 341 (6th Cir. 1984).

Employing a similar analysis of Illinois law shows that the sheriff is similarly treated. In Illinois the sheriff is described in the Constitution as a "county officer" and is located in the Local Government Article. S.H.A. Const. Art.7, §4. He is elected by the voters of the county. *Id.*, §4(a). His duties, powers and functions are provided by law and by county ordinance, as well as the duties, powers or functions derived from common law or historical precedent unless altered by law or county ordinance. *Id.*, §4(d). His salary and operating expenses are set by a county appropriation ordinance and are paid from the county treasury. Ill.Rev.Stat., ch.125, §14e. The sheriff may

appoint deputies not to exceed the number allowed by the county board, Ill.Rev.Stat., ch.125, §7. The sheriff is liable for any neglect or admission of the duties performed by his deputies, Ill.Rev.Stat., ch.125, §13. All expenditures of the sheriff's office including the purchase of equipment are subject to the county appropriation ordinance. The sheriff must maintain an office in the county seat, the hours of which may be fixed and determined by the county board, Ill.Rev.Stat., ch.125, §15. The sheriff shall be the conservator of the peace in his county, Ill.Rev.Stat., ch. 125, §17.

Comparing Illinois law and Ohio law shows that a sheriff in Illinois is as much a county officer as the Sheriff of Hamilton County, Ohio. He therefore is just as able to establish the official position of his County Board as the Sheriff of Hamilton County, Ohio was his. Therefore the court finds that the Sheriff of DuPage County is a final policymaker for DuPage County under *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986). The cases cited by defendant, *Thomas v. Talesky*, 554 F.Supp. 1377, 1379 (N.D.Ill. 1983) and *Baltz v. County of Will*, 609 F.Supp. 992, 995 (N.D.Ill. 1985), were all decided before *Pembaur* and therefore inapplicable.

B. State's Attorney

State's Attorneys on the other hand are provided for in the Judicial article of the Illinois Constitution S.H.A. Const. Art. 6, §19.[8] A State's Attorney's duties are provided in Ill.Rev.Stat., ch.14., §1. Section 1 provides that

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[8] The Sixth Circuit did not make a statutory analysis for the office of prosecutor of Hamilton County as it did for the Sheriff

the State's Attorney before entering upon the duties of his office "shall . . . be commissioned by the Governor." He also shall execute a bond to the People of the State of Illinois to be approved by the circuit court of his county and is to be filed with the Secretary of State and shall be to the benefit of the state, county, corporation or person injured by any breach. (*Id.*) Section 1.1 establishes the date of the commencement of his duties. Section 5 provides for the duties of the State's Attorney which include, *inter alia*, "to commence and prosecute all actions, suits, indictments and prosecution civil and criminal, in the circuit court for his county in which the people of the state or county may be concerned." Section 5(a) provides that the State's Attorney shall control the internal operations of his office and procure the necessary equipment, materials and services to perform the duties of his office. Furthermore, Illinois courts have held that the office of the State's Attorney is part of the Executive Branch of state government and its powers are executive powers. *People v. Thompson*, 43 Ill.Dec.600, 410 N.E.2d 600 (4th Dist. 1980); *People v. Stinger*, 317 N.E.2d 340, 342 (2nd Dist. 1974).

It seems clear therefore that the office of State's Attorney is distinguishable from the office of Sheriff with the former being a state officer and the latter being a county officer. This is particularly clear where as here the State's Attorney is prosecuting an individual, in the name of the People, for allegedly violating the State Criminal

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of Hamilton County. According to the court there appeared to be no dispute that the prosecutor established county policy. *Pembaur*, 746 F.2d at 341 n.3.

Code. *Jones v. City of Chicago*, 639 F.Supp 146 (N.D.Ill. 1986); *Stokes v. City of Chicago*, 660 F.Supp. 1459 (N.D.Ill. 1987). The court therefore finds tht [sic] the State's Attorney is not a policymaker for his county. Accordingly, the motion to dismiss by the County of DuPage is denied insofar as the complaint pleads a cause of action based upon the actions of the Sheriff of DuPage County, and is granted insofar as the complaint pleads a cause of action based upon the actions of the State's Attorneys of DuPage County.

CONCLUSION

The complaint is dismissed against defendants Ryan, Knight, Kilander, King, German, Olsen and Robbins and denied as to defendants Fitzsimmons and the County of DuPage.

IT IS SO ORDERED.

/s/ Harry D. Leinenweber
HARRY D. LEINENWEBER, Judge
United States District Court

DATED: JUN 9 1989

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

(Caption Omitted In Printing)

AGREED ORDER DIRECTING ENTRY OF FINAL JUDGMENT PURSUANT TO FED.R.CIV.P. 54(b)

This matter coming before the Court pursuant to the parties' joint motion for the entry of a final judgment on this Court's Memorandum Opinion and Order of June 9, 1989, granting in part and denying in part the Defendants' Motion to Dismiss. In granting said motion, this Court makes the following findings:

1. This civil rights case arose from the Plaintiff's arrest, prosecution and imprisonment for the murder of eleven year old Jeanine Nicarico in 1983. The case was brought against (1) the County of DuPage, (2) the current State's Attorney of DuPage County, James Ryan, his predecessor, Michael Fitzsimmons, and several current and former Assistant DuPage County State's Attorneys (State's Attorney Defendants); (3) DuPage County Sheriff Richard Doria and several Sheriff's Deputies (Sheriff's Department Defendants); and, (4) two expert witnesses and the Estate of a deceased expert witness (expert witness Defendants), all who testified during Plaintiff's prosecution.

2. All Sheriff's Department Defendants have answered the complaint and asserted an affirmative defense of qualified immunity.

3. The County, the State's Attorney Defendants and the expert witness Defendants filed Motions to Dismiss Plaintiff's Complaint pursuant to Fed.R.Civ.P. 12(b)(6).

The State's Attorneys' Motion was premised primarily on grounds of absolute prosecutorial immunity. The expert witness' Motion was premised primarily on absolute witness immunity. The County of DuPage's Motion argued that it could not be held liable for acts perpetrated by members of either the DuPage County State's Attorney's Office or the DuPage County Sheriff's Department.

4. On June 9, 1989, this Court entered a Memorandum Opinion and Order denying in part and granting in part the Defendants' Motions:

(A) The Court granted the expert witness' Motion to Dismiss.

(B) The Motion to Dismiss the State's Attorneys was granted as to all State's Attorney Defendants, except for former DuPage County State's Attorney Michael Fitzsimmons. In this Court's opinion, absolute immunity is not available to Fitzsimmons on Plaintiff's claims that he was denied a fair trial because of prejudicial pretrial public statements made by Fitzsimmons in connection with the announcement of Plaintiff's indictment.

(C) The County of DuPage's Motion was granted as to its' contention that it should not be held liable under *Monell v. New York City Dept. of Soc. Serv.*, 436 U.S. 658 (1978), for actions of any members of the DuPage County State's Attorney's Office. However, the Motion was denied insofar as this Court determined that the County could be held liable under *Monell* for acts of members of the Sheriff's Department.

5. On July 10, 1989, Defendant Michael Fitzsimmons filed a Notice of Appeal to the Seventh Circuit Court of Appeals from this Court's determination that he was not entitled to absolute immunity for making prejudicial pre-trial statements. That appeal was taken as a matter of right pursuant to *Mitchell v. Forsyth*, 472 U.S. 511 (1985).

6. This Court therefore finds, pursuant to Fed.R.Civ.P. 54(b), that its order of June 9, 1989, disposed of more than one but fewer than all of the claims and parties, and further expressly finds that there is no just reason for delay, particularly since a portion of this order is already being appealed as a matter of right by the Defendants.

7. Accordingly, this Court hereby directs the Clerk to enter final judgment pursuant to Fed.R.Civ.P. 54(b) as to the entirety of its order of June 9, 1989.

/s/ Leinenweber
JUDGE LEINENWEBER

DATED August 8, 1989

APPROVED AS TO FORM & SUBSTANCE:

/s/ James G. Sotos
JAMES G. SOTOS,
One of the Attorneys
for the Defendants

/s/ G. Flint Taylor
G. FLINT TAYLOR,
One of the Attorneys
for the Plaintiff

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
Eastern Division

Stephen Buckley	JUDGMENT IN A CIVIL CASE
V.	CASE NUMBER:
County of DuPage et al	88 C 1939
	(Docketed Aug 10, 1989)

___ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

_X_ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment is entered pursuant to Fed.

R.Civ.P. 54(b) as to the entirety of this Court's order of June 9, 1989 stating on counts I, III, IV, V and VI of plaintiff's complaint are dismissed as to defendants Ryan, Knight, Kilander, King and Fitzsimmons on motion of defendants. Further, plaintiff's complaint is dismissed as to the expert witnesses on motions of the expert witnesses. The motion to dismiss by the County of DuPage is denied insofar as the complaint pleads a cause of action based upon the actions of the Sheriff of DuPage County, and is granted insofar as the complaint pleads a cause of action based upon the actions of the State's Attorneys of DuPage County.

August 9, 1989
Date

H. STUART CUNNINGHAM
Clerk

/s/ Illegible
(By) Deputy Clerk

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 89-2441, 89-2899, and 89-2900

STEPHEN BUCKLEY,

Plaintiff-Appellee – Cross-Appellant,

v.

J. MICHAEL FITZSIMMONS, *et al.*,

Defendants-Appellants – Cross-Appellees.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 88 C 1939 – **Harry D. Leinenweber,** *Judge.*

ARGUED SEPTEMBER 27, 1990 –
DECIDED DECEMBER 5, 1990

Before WOOD, JR., and EASTERBROOK, *Circuit Judges,* and FAIRCHILD, *Senior Circuit Judge.*

EASTERBROOK, Circuit Judge. Probable cause is enough to initiate a criminal prosecution. It takes proof beyond a reasonable doubt to convict. That difference, together with uncertainties in what the evidence will show, implies that some innocent persons will be prosecuted. Trial is supposed to filter out the innocent, a task it serves well if imperfectly.

Accusation and trial are wrenching experiences, especially for the innocent. On top of trauma come expense and often the loss of freedom pending disposition. How should society respond when an innocent person is prosecuted? Apologies are mild balm at best. Money is more effective. Compensation not only would aid the involuntary participant in the criminal justice system but also would induce prosecutors to evaluate cases more carefully, taking account of the costs to the defendants. Yet prosecutors rarely apologize, and states do not compensate defendants acquitted by the jury, or against whom charges are dropped. Often neither apology nor compensation is in order, because the suspect is guilty but for one reason or another is not convicted. Sometimes both are called for, but they are almost never forthcoming.

Innocent defendants, rightly feeling put upon, may respond to this governmental indifference by turning on their accusers, making them defendants in turn. They demand that the prosecutors, police, and witnesses dig into their own pockets to provide recompense. If courts could quickly and reliably identify malicious prosecutions, those in which the case was manufactured or conviction unattainable, it might make sense to award damages, to cause prosecutors with the power to destroy others' lives to do their jobs with the care that their responsibilities require. But the legal system is neither quick nor infallible. To allow a search for malicious or weak prosecutions is to license litigation at any defendant's option. And if malicious prosecutions are rare, then even a low rate of error in suits against prosecutors will lead to more false positives than to vindication of

just claims. Given the error inevitable in our legal system – in criminal prosecutions as well as in follow-on civil litigation – a system of personal liability for prosecutors and witnesses would do more to discourage the activity of criminal prosecution (or testifying) than to make the prosecutors and witnesses more careful and honest. Because criminal prosecutions regularly do more good than bad, and because prosecutors have no way to use these social benefits to offset the damages they could be called on to pay when their activities injure the innocent, courts have concluded that both prosecutors and witnesses generally are immune from damages on account of errors. *Imbler v. Pachtman*, 424 U.S. 409 (1976); *Briscoe v. LaHue*, 460 U.S. 325 (1983).

How far does this immunity extend? Does it cover the process of investigating and evaluating a case as well as the trial itself? If so, it could throw a blanket of immunity over acts that may lead to liability when performed by police, see *Jones v. Chicago*, 856 F.2d 985 (7th Cir. 1988); *Smith v. Springer*, 859 F.2d 31 (7th Cir. 1988), decision after remand under the name *Smith v. Chicago*, 913 F.2d 469 (7th Cir. 1990). If not, criminal defendants can evade the immunity established by *Imbler* by asserting that, before the trial began, the prosecutors prepared to do precisely what they did. That would create the same risk of error, and exposure to retaliatory counterstrikes, that *Imbler* and *Briscoe* are meant to avert. We must decide how far immunity doctrines extend in a world in which the most logical option, governmental liability, may well be closed by *Monell v. Department of Social Services*, 436 U.S. 658 (1978).

I.

Jeanine Nicarico, 10 years old, was home with the flu on Friday, February 25, 1983. Her mother Patricia, a teacher, came home to fix lunch for Jeanine, then returned to school. Not long after that someone kicked in the front door to the Nicarico home, trussed Jeanine up in bedclothes, and carried her off. Marks on the walls and door jamb bore mute witness to her efforts to resist. The intruder took no valuables – nothing other than the blanket and its occupant. *People v. Hernandez*, 121 Ill. 2d 293, 521 N.E.2d 25, 26-27 (1988).

The kidnapper drove Jeanine into the country and pulled her nightgown over her head. Unsuccessful in a determined attempt to penetrate her vagina, the kidnapper raped Jeanine in the anus. Now he became her assassin. He caved in her skull with five blows from a tire iron or baseball bat and threw her into the mud 45 feet off the Illinois Prairie Path, a hiking trail. Jeanine died within four hours of the time she ate lunch with her mother. The police found the body on February 27, and the manhunt began.

John Sam, the detective with the DuPage County Sheriff's Police leading the investigation, concentrated on the principal clue the intruder left behind: a clear print (the "bootprint") of the sole of a shoe appeared on the Nicaricos' door. While other detectives interviewed neighbors and persons who might have seen the kidnapper drop Jeanine's body near the trail, Sam tried to find the owner of the shoe. A $10,000 reward attracted Alex Hernandez, a petty thief with low intelligence and a

desire to become a police officer. Hernandez said that he overheard a conversation between Stephen Buckley and "Ricky" in which "Ricky" talked about the crime. Sam tracked down Buckley, an unemployed high school dropout. Buckley admitted having shoes with soles like those in the bootprint on the door. He brought them to Sam for analysis.

John Gorayczyk, the head of the identification section in the DuPage County crime laboratory, decided that Buckley's shoes did not match the bootprint: the soles were the same, but the heels were a little different. Edward R. German, a forensic scientist in the Illinois state crime laboratory, was only a little more positive: he concluded that Buckley's shoe "could have at best" made the print. Prosecutors then sent the shoe to Robert Olsen, with the Kansas Bureau of Identification, who concluded that Buckley's shoe "probably" matched the marks on the door. Prosecutors also brought in Louise Robbins, a professor of anthropology at the University of North Carolina at Greensboro. Robbins, who later testified that she could identify the wearer of a shoe with certainty even if she had only prints made with different shoes, concluded that Buckley positively made the marks on the Nicaricos' door.

Meanwhile the investigation was proceeding on other fronts. Two witnesses – one near the Nicaricos' house, another near the Prairie Path – identified Buckley as the driver of a green Ford Granada, missing a hubcap, that left the neighborhood and arrived at the Prairie Path at the right times. These witnesses were positive, even though their earlier descriptions did not match Buckley's features. (One of them initially told police that the driver,

in his late 20s or early 30s, wore granny glasses and was clean shaven; Buckley, 20, had a mustache and does not wear glasses.) Hernandez said that he took some role in Jeanine's abduction and implicated Rolando Cruz, who also confessed (although neither to the rape nor to the murder); both said that Buckley drove the car. Neither Cruz nor Hernandez both of whom have substantially below average intelligence could give important details of the offense, but some circumstantial evidence implicated each.

John Sam arrested Buckley, Cruz, and Hernandez, and they were put on trial for their lives. But Sam began to question the conclusion that the three did it – partly because of discrepancies in the identifications and other details (witnesses reported only a single person in the car); partly because none of the three had a record of sex offenses; partly because Cruz and Hernandez contended that they came to burgle the Nicarico house and took some items, though nothing was missing; but mostly because he was convinced that men who violate little girls do not work in teams. Sex crimes he had solved were solitary aggressions. Sam told his superiors they had the wrong defendants. When they would not listen, Sam quit the force and offered to testify for the defense. James Tuohy, *The DuPage Cover-Up*, Chicago Lawyer 1, 9-14 (May 1986).

A jury convicted Cruz and Hernandez of murder, among other crimes, and the judge sentenced both to death. It was unable to reach a verdict about Buckley, and the prosecutor scheduled a second trial. While prosecution and defense were preparing for retrial, police in LaSalle County arrested Brian Dugan for the abduction,

molestation, and murder of 7 year old Melissa Ackerman. Discussing the charges with his lawyer, Dugan admitted two other rape-murders: Donna Schnorr and Jeanine Nicarico. He furnished details for each, many of which had never been publicized. He also told his lawyer that after killing Jeanine he threw away the shoes he wore. Soles of the shoe style Dugan says he bought at a Fayva store matched the bootprint at least as closely as Buckley's, probably better. A farmer in the area where Jeanine's body was found recalls plowing up a pair of boots in 1983.

Dugan, 29, had a history of violent sex offenses, always solitary. His lawyer used the admissions and a willingness to plead guilty to all three crimes to avoid the death penalty. Dugan would give no statement creating a risk of capital punishment. LaSalle County made the deal, and Dugan is in jail for life on account of the Schnorr and Ackerman slayings. But prosecutors in DuPage County refused to accept Dugan's offer, concluding that his admissions were unreliable. Although Dugan furnished many details that checked out, he also claimed that Jeanine was so well bound that she did not grab anything as they left; the walls of the Nicarico house testified to the contrary.

As DuPage County was preparing to put Buckley on trial a second time, Louise Robbins died. No one else was willing to testify that the bootprint inexorably showed Buckley's guilt. James Ryan, State's Attorney for DuPage County, dismissed the charges against Buckley. He was released in March 1987 after three years in prison; he had been unable to post the $3 million bond. In January 1988 the Supreme Court of Illinois reversed the convictions of

Cruz and Hernandez on the basis of *Bruton* violations at trial: the prosecutor introduced each man's confession implicating the other, and the substitution of euphemisms for names did nothing to hide the accusations from the jury, the court held. *Hernandez*, 521 N.E.2d at 32-37; *People v. Cruz*, 121 Ill. 2d 321, 521 N.E.2d 18 (1988). See also *Cruz v. New York*, 481 U.S. 186 (1987) (rejecting the interlocking confessions exception to *Bruton*). The court did not forbid retrial, concluding that the evidence is sufficient to allow a jury to find guilt. Cruz and Hernandez were retried. Cruz was convicted and has again been sentenced to death. Hernandez's case was mistried because the jury could not agree; Ryan has announced that he will take Hernandez to trial a third time.

Buckley filed this suit under 42 U.S.C. §1983 in 1988. He contends that almost everyone connected with the investigation and prosecution violated his constitutional rights and should be made to pay damages. J. Michael Fitzsimmons, State's Attorney for DuPage County at the time of Buckley's indictment, is the lead defendant. Ryan is among the other defendants, who include the Sheriff of DuPage County, many members of the Sheriff's police, many prosecutors on the State's Attorney's staff, three experts who analyzed the bootprint (German, Olsen, and Robbins), and DuPage County itself.

Everyone who had anything to do with this prosecution, other than Sam and Gorayczyk, has a place in Buckley's rogues' gallery. His complaint contends that all participated in a conspiracy to execute him, although all knew that he is innocent. The ringleader, as Buckley sees things, is Fitzsimmons, who wanted to solve the Nicarico murder to boost his popularity. State's Attorney since

1976, Fitzsimmons was running against Ryan in the Republican primary in spring 1984. To give his campaign a boost, the complaint alleges, Fitzsimmons convened a special grand jury and instructed his assistants to produce an indictment. Buckley narrates a tale of coercive interrogations in 1983 and 1984 by police and prosecutors, arm-twisting of experts that led them to "find" similarities between his shoes and the bootprint, misleading presentations to the grand jury, indictment, and stubborn refusal to dismiss the case despite Dugan's confession. Fitzsimmons announced the indictment at a press conference on March 9, 1984; Buckley maintains that this also violated his rights by turning the community against him, reducing the chance that he could obtain bail or a fair trial. The complaint is full of particulars; we take them as gospel, but the usual caveat applies.

Most of the defendants moved to dismiss the complaint on grounds of immunity, absolute or qualified. DuPage County moved to dismiss on the ground that §1983 does not establish vicarious liability, see *Monell*, 436 U.S. at 691-95, and that neither the Sheriff nor the State's Attorney made "policy" for the County, so it could not be liable directly. Th district judge delivered a split decision. 1989 U.S. Dist. LEXIS 6689 (N.D. Ill.). Ryan and all of the assistant prosecutors prevailed under *Imbler*; the judge concluded that convening the grand jury, presenting information to it, preparing the case (including the expert witnesses), and even interviewing Buckley are covered by absolute immunity. The three expert witnesses received absolute immunity under *Briscoe* and *Kincaid v. Eberle*, 712 F.2d 1023 (7th Cir. 1983), for their out-of-court preparation as well as for their testimony. Fitzsimmons

prevailed on all claims but one: the judge concluded that his announcement of the indictment to the press was not covered by absolute immunity. DuPage County, however, lost. Although the court concluded that state's attorneys are state rather than local officials, so that Fitzsimmons and Ryan were not policy-makers for the county, it concluded that the sheriffs are final policymakers for their counties. Acts of the Sheriff therefore could be the basis of liability for DuPage County, *Pembaur v. Cincinnati*, 475 U.S. 469 (1986), and the court retained the county in the case.

At this point the county, Fitzsimmons, the Sheriff, and members of the Sheriff's police remained as defendants. It was time to start discovery. Instead, almost everyone appealed. Naturally the first question is appellate jurisdiction.

II.

Fitzsimmons' appeal from the order refusing to accord him absolute immunity is within our jurisdiction on the authority of *Nixon v. Fitzgerald*, 457 U.S. 731 (1982), which holds that the denial of a substantial claim of absolute immunity is immediately appealable under 28 U.S.C. §1291. Jurisdiction over the other appeals depends on Fed. R. Civ. P. 54(b), which allows the court to enter final judgment on particular claims or parties. At all parties' request, the district judge entered a judgment designed to allow appeals to be taken under Rule 54(b). More than a year after entering the orders, and after oral argument in this court the district judge also certified a

question for interlocutory appeal under 28 U.S.C. §1292(b). We start with Rule 54(b).

Rule 54(b) does not allow a judge to certify for interlocutory decision issues such as "Is a sheriff a policymaker for counties in Illinois?" When an issue is unresolved and interlocutory resolution could materially advance the termination of the litigation, §1292(b) allows the district judge to certify the question. The court of appeals decides whether to entertain the appeal. Rule 54(b) serves a different function: carving out of a complex case individual claims that have been finally resolved. *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 437-38 (1956). rule 54(b) allows a court to "direct the entry of a final judgment as to one or more but fewer than all of the claims or parties" but does not change the ordinary meaning of "final". So it does not authorize appeal of decisions that, if made in stand-alone litigation, would not be "final". *Liberty Mutual Insurance Co. v. Wetzel*, 424 U.S. 737 (1976); *Horn v. Transcon Lines, Inc.*, 898 F.2d 589 (7th Cir. 1990). Unless the court enters final judgment on an entire "claim", or wraps up the case with respect to all claims involving a particular party, Rule 54(b) does not permit an immediate appeal. E.g., *Steve's Homemade Ice Cream, Inc. v. Steward*, 907 F.2d 364 (2d Cir. 1990); *FDIC v. Elefant*, 790 F.2d 661, 664 (7th Cir. 1986); *Horn*, 898 F.2d at 593-95.

The district judge entered judgment in favor of Ryan, the assistant prosecutors, and the three expert witnesses. Buckley's appeal puts all of these before us. Fitzsimmons and DuPage County, however, continue to be parties in the district court. Demands against them may be brought here only if the district judge has finally determined

entire "claims" for relief. DuPage County moved for dismissal on the ground that neither the State's Attorney nor the Sheriff set policy for the county. That motion was denied. The court knocked out one of Buckley's theories but refused to dismiss the claim. Further proceedings lay in store. The denial of a motion to dismiss (or for summary judgment) is not a "final" decision. More than two weeks after oral argument DuPage County moved to dismiss its appeal, agreeing with Buckley's argument, first made in his brief on the merits, that the court lacks jurisdiction; that motion is granted.

Jurisdiction over Buckley's appeal against Fitzsimmons and DuPage County depends on the meaning of "claim" in Rule 54(b). We understand a "claim" for purposes of Rule 54(b) to mean factually or legally connected elements of a case. *Horn*, 898 F.2d at 592. "It has seemed to us implicit in the rule that the retained and the appealed claims must be factually distinct, for otherwise the court of appeals may be forced to analyze the same facts in successive appeals, a form of piecemeal appealing not authorized by the rule." *Olympia Hotels Corp. v. Johnson Wax Development Corp.*, 908 F.2d 1363, 1366 (7th Cir. 1990). The claim against Fitzsimmons remaining in the district court is factually related to the claims on which he prevailed; indeed, Buckley alleges that the announcement of the indictment and Fitzsimmons' other acts are all part of a single plan. Similarly, the claim that DuPage County set a "policy" through the decisions of the two states' attorneys is factually related to the claim that it set a policy by the decisions of the Sheriff. Buckley alleges one conspiracy, one policy, one injury.

Olympia Hotels expresses unease with the circuit's definition of a "claim", recognizing that judicial resources may be conserved rather than squandered by accelerating decision on a controlling issue, even if there is a chance that related questions could recur. Of course one cannot go too far with this recognition: jurisdiction is a question of judicial power, not of convenience. When immediate review could materially advance the termination of the litigation, §1292(b) supplies the route but allows the court of appeals to exercise discretion, a filter missing in appeals under Rule 54(b). The rule does not allow the entry of judgments that would not be "final" within the meaning of §1291, see *Horn*, 898 F.2d at 593-94, and a decision foreclosing one theory of liability while leaving others open is not "final" on any understanding of that term.

Still, how much factual overlap is too much is a question of degree, and *Olympia* properly observed that Rule 54(b) commits the decision on such matters to the informed discretion of the district judge. 908 F.2d at 1367-68. Such discretion, thoughtfully exercised, will rarely be disturbed. Unfortunately, nothing in this record suggests that the district judge has "assess[ed] the desirability of immediate judgment and unequivocally give[n] an affirmative answer." *Local P-171 v. Thompson Farms Co.*, 642 F.2d 1065, 1073 (7th Cir. 1981). After Fitzsimmons took an appeal from the denial of his motion to dismiss, the parties presented the district judge with an "agreed order directing entry of final judgment". The judge signed this order. What the parties prepared for the judge contains no discussion of the relation between the claims finally disposed of and those remaining for decision, no

appreciation of the potential for successive decision and weighing the benefits of immediate resolution against the cost to the judicial system. For all we can see, the district judge gave no consideration to systemic interests in preserving the norm of one appeal per case – and of minimizing the number of appeals if there must be more than one. Indeed, nothing suggests that the judge recognized that he was entering a "final judgment" *denying* a motion to dismiss! We have remarked before that district judges may not reflexively enter Rule 54(b) judgments just because the parties want to appeal. *Horn*, 898 F.2d at 592; see also *Glidden v. Chromalloy American Corp.*, 808 F.2d 621, 624 (7th Cir. 1986).

According to the complaint there was a single conspiracy in which the Sheriff and both State's Attorneys participated, producing a "policy" of prosecuting the innocent. Whether adopted through the Sheriff or the State's Attorneys, this single "policy" is the basis of the claim. No matter what we would say about the State's Attorney's role as a policymaker for counties in Illinois, the same set of facts would come back later concerning the Sheriff's role; legal issues also would be similar. Because governmental bodies are not entitled to official immunity, *Owen v. Independence*, 445 U.S. 622 (1980), the questions about DuPage County are unrelated to the immunity issues presented in the appeals properly before us. Buckley's "claim" against the county therefore has yet to yield a "final" decision appealable under Rule 54(b). We dismiss Buckley's appeal to the extent it asks us to decide whether DuPage County may be liable on account of the State's Attorneys' decisions.

Buckley's appeal against Fitzsimmons encounters the same problem. Although the court concluded that Fitzsimmons has absolute immunity from liability on account of most of the incidents about which Buckley protests, it did not dismiss the claim or grant summary judgment in Fitzsimmons's favor. That is why Fitzsimmons is appealing, as he is entitled to do even though the decision is interlocutory. Buckley may appeal, though, only if the decision is "final" within the meaning of Rule 54(b), and it is not.

Is this inconsistent? Fitzsimmons's appeal depends on a conclusion that the decision denying his motion to dismiss is "final" within the meaning of 28 U.S.C. §1291. "Finality" means the same thing under §1291 and Rule 54(b), see *Horn*, 898 F.2d at 593-94, for the rules do not enlarge jurisdiction. See Fed. R. Civ. P. 82; Fed. R. App. P. 1(b). What is "final" about the decision, though is only the conclusion that the case must proceed. Fitzsimmons lost his "right not to be tried" and to avoid discovery, ingredients of immunity separate from an entitlement to prevail on the merits. *Mitchell v. Forsyth*, 472 U.S. 511, 524-29 (1985); *Helstoski v. Meanor*, 442 U.S. 500 (1979). Finality of this kind is a one-way street; only the holder of the "right not to be tried" may appeal, because only he experiences a "final" decision.

Perhaps Buckley could invoke pendent appellate jurisdiction. That concept sometimes allows a court to consider extra issues in an interlocutory appeal. *Illinois ex rel. Hartigan v. Peters*, 861 F.2d 164 (7th Cir. 1988); *Patterson v. Portch*, 853 F.2d 1399 (7th Cir. 1988). We could assume jurisdiction of Buckley's appeal against Fitzsimmons only if the doctrine allows the addition of *appellants*

as well as *issues*. Just as pendent-party jurisdiction in the district court is harder to support than is the addition of issues, *Finley v. United States*, 109 S. Ct. 2003 (1989), so pendent-party appellate jurisdiction is especially problematic. *Abney v. United States*, 431 U.S. 651, 662-63 (1977), tells us not to allow interlocutory appeals to acquire barnacles. Although *Abney* is a double jeopardy case, it is the foundation for the entitlement to immediate appeal when the defendant asserts a right not to be tried. Its flat conclusion that each issue, and presumably each party, must find a separate basis of appellate jurisdiction governs in other cases of the same stripe. We therefore dismiss Buckley's appeal to the extent he seeks relief against Fitzsimmons.

What remains is the belated certification under §1292(b). Just as the parties wrote for the judge a Rule 54(b) judgment, which he signed without comment, so they wrote for him a §1292(b) certification, which again he signed without change. Again the parties' draftsmanship and timing leaves much to be desired. Here is the operative part of the order they wrote for the judge:

> In this Court's opinion, its memorandum opinion and order of June 9, 1989 involves a controlling issue of law as to which there is [sic] substantial grounds for difference of opinion and that an immediate appeal from this order may materially advance the ultimate termination of the litigation. This issue is, inter alia, whether the State's Attorney and/or Sheriff of DuPage County are county officials and/or policymakers for purposes of *Monell* liability under 42 U.S.C. §1983

Section 1292(b) requires the court to identify the issues, not to assert that one issue is important "inter alia"; we expect the court to *explain* why, rather than assert that, immediate appeal will materially advance the disposition. Courts should do their own writing. If they allow lawyers to draft for them, they should at least see to it that the lawyers have everything in order.

There is also a deeper flaw: delay. Appeals must be taken within a short time after the entry of the orders appealed from, and §1292(b) sets one of the shortest limits at ten days. Although Fed. R. App. P. 5(a) allows a judge to amend the ruling to add a §1292(b) certification at any time, we held in *Weir v. Propst*, 915 F.2d 283, 287 (7th Cir. 1990), that this power must not be used promiscuously. "An amendment that will have the effect of extending the limitation is proper only if there is a reason for the delay." In *Weir* neither the parties nor the judge gave a reason for the delay; we declined to accept the appeal. So here. Judge Leinenweber is silent on the question (the parties neglected to draft for him with *Weir* in mind), and the joint motion for leave to appeal gives as a reason only the skepticism expressed at oral argument about jurisdiction under §1291. *That* jurisdictional problem is largely attributable to the parties, and at all events the problem with the Rule 54(b) judgment was first flagged by the plaintiff's brief, filed in January 1990. Delay after that is unjustifiable, and we decline to accept an appeal from a certification made after oral argument in this court.

III

Imbler reserved all questions concerning the extent to which absolute prosecutorial immunity applies to investigation and preparation for trial. 424 U.S. at 430-31 & n.33. Some may be resolved this Term. *Burns v. Reed*, 894 F.2d 949 (7th Cir.), cert. granted, 110 S. Ct. 3269 (1990). In the interim we must reach a decision influenced by the functions immunity serves.

Buckley maintains that absolute immunity is limited to the trial itself. Fitzsimmons and the other defendants submit that anything leading up to trial is within the scope of absolute prosecutorial immunity. Responding to a question at oral argument, counsel for Fitzsimmons said that prosecutorial immunity would be absolute even if prosecutors tortured Buckley to obtain a confession. Neither of these limiting positions can be right.

Buckley's position would turn *Imbler* into a pleading rule. Anyone wishing to challenge his prosecutors would need only challenge the investigatory and preparatory steps that precede every prosecution, throwing in the appellation "conspiracy" for good measure. Immunity is not limited to cases filed and tried without investigation or planning; why should it protect only irresponsible prosecutors? Buckley wants to relitigate the merits of the criminal charge against him and to recover damages if the charge was unfounded; prosecutorial immunity prevents turning the tables in this fashion. *Imbler*, 424 U.S. at 425; *Butz v. Economou*, 438 U.S. 478, 512-17 (1978); *Mitchell v. Forsyth*, 472 U.S. 511, 522-23 (1985). See also *Yaselli v. Goff*, 12 F.2d 396 (2dCir. 1926), affirmed, 275 U.S. 503 (1927). If

absolute immunity has value – as the Supreme Court believes it does – we must prevent its evasion.

Fitzsimmons and the other defendants are wrong because immunity applies to the act, not the actor. *Forrester v. White*, 484 U.S. 219, 227 (1988). An Attorney General who approves a national security wiretap does not have absolute immunity, even though the information may lead to prosecution. *Mitchell*, 472 U.S. at 520-24. Courts regularly hold that prosecutors filling the roles of detectives must face the music for wrongs committed against suspects to the same extent as detectives do. E.g., *Auriemma v. Montgomery*, 860 F.2d 273 (7th Cir. 1988); *Hampton v. Chicago*, 484 F.2d 602 (7th Cir. 1973). Police who use the third degree in interrogation, or break open doors, must show that their acts were objectively reasonable; the security of personal rights would be markedly diminished if the state could investigate at will, and without risk, by shifting the same functions to lawyers. Immunity is absolute only when the prosecutor performs distinctively prosecutorial functions.

A

Because immunity follows the act rather than the actor, it is essential to define "prosecutorial" acts. Any definition must depend in turn on why courts extend immunity to prosecutors in the first place. Why not use damages to induce proper conduct in every case? Because damages would lead prosecutors to temper their judgment. Tempering might be an acceptable cost of a damages regimen if the costs of prosecutorial errors were high, but the criminal process itself offers sufficient

opportunities to prevent harms, so that damages remedies are unnecessary. These considerations imply an appropriate scope of immunity.

Litigation has losers. They may "transform [their] resentment at being prosecuted into the ascription of improper and malicious actions to the State's advocate". *Imbler*, 424 U.S. at 425. Even the winners may be losers. Defendants may spend days, even years, in prison awaiting trial, as Buckley did. Yet litigation would be even more difficult and costly than it is if, after the first trial, there were a second with the positions of the parties reversed. Prosecutors, whose professional duties necessarily make the lives of some uncomfortable, would be special targets. Attorneys for the government could protect themselves from retaliation by quiescence. Victims of crime cannot compel prosecution of offenders or collect damages from passive prosecutors. *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973); *Leeke v. Timmerman*, 454 U.S. 83 (1981). Society does not reward prosecutors for convicting the guilty; requiring prosecutors to compensate defendants for injury inflicted without giving them a bonus for the benefits they create would create a bias: in close cases it would always pay to forego prosecution. Yet society prefers to induce such prosecutions. Putting a case before a court is no evil, even when there is reason to doubt its strength. "A prosecutor often must decide, especially in cases of wide public interest, whether to proceed to trial where there is a sharp conflict in the evidence. The appropriate course of action in such a case may well be to permit a jury to resolve the conflict. Yet, a prosecutor understandably would be reluctant to go forward with a close case where an acquittal likely would

trigger a suit against him for damages." *Imbler*, 424 U.S. at 426 n.24.

Prosecutors should (and most routinely do) take account of the costs they inflict on others. If suits were the only way to impress prosecutors with the gravity of these costs, damages could be a necessary evil – which is why police officers and even attorneys general do not possess absolute immunity when conducting investigations. Courts can curtail the costs of prosecutorial blunders without the need for damages, however, by cutting short the prosecution or mitigating its effects. *Mother Goose Nursery Schools, Inc., v. Sendak*, 770 F.2d 668, 674 (7th Cir. 1985). "[S]afeguards built into the judicial process tend to reduce the need for private damages actions as a means of controlling unconstitutional conduct." *Butz*, 438 U.S. at 512. Judges are involved early on. The principal cost of wrongful prosecution is the imprisonment of the defendant before trial. Yet imprisonment depends on a demonstration of probable cause in court. *Gerstein v. Pugh*, 420 U.S. 103 (1975). Even after the prosecutor establishes probable cause, the judge may release the defendant on bail or ameliorate the harshness of imprisonment. Prosecutorial action is a necessary *but not sufficient* condition of imprisonment; injury will not long continue unless one or more judges is impressed with the gravity of the charge and the weight of the evidence assembled. If the evidence is enough to satisfy a judge, there is correspondingly less reason to blame the prosecutor. Of course there may be some reason; maybe the evidence has been cooked. Cf. *Malley v. Briggs*, 475 U.S. 335 (1986); *Jones v. Chicago*, 856 F.2d at 994. Absolute immunity depends on a

judgment that the probability of putting one over on a court is sufficiently low, and the burden of litigation afterward to determine *whether* prosecutors made up the case sufficiently high, that attempts to litigate the question should be foregone. This is a reasonable judgment when a court can step in early, curtailing the injury; it is not a sound conclusion when an act (by prosecutor or police officer) causes injury that is complete before the case reaches court. See *Mitchell*.

Prosecution causes injuries in addition to imprisonment. Accusations of crime impugn the good name of defendants. Trial is an unpleasant experience as well as an expensive one. But these injuries, too, may be curtailed by judicial action. Residual injuries have never been deemed sufficient to call for damages against public prosecutors, or even for such medicaments as interlocutory appeals. E.g., *Midland Asphalt Corp. v. United States*, 109 S. Ct. 1494 (1989); *Flanagan v. United States*, 465 U.S. 259 (1984); *United States v. Hollywood Motor Car Co.*, 458 U.S. 263 (1982); *Cobbledick v. United States*, 309 U.S. 323 (1940). Expense and inconvenience are endemic to any legal system; the costs of justice in ours do not imply either especially prompt review or damages afterward. See *FTC v. Standard Oil Co.*, 449 U.S. 232, 244 (1980); *Renegotiation Board v. Bannercraft Clothing Co.*, 415 U.S. 1, 24 (1974); *Petroleum Exploration, Inc. v. Public Service Comm'n*, 304 U.S. 209, 222 (1938); *PaineWebber Inc. v. Farnam*, 843 F.2d 1050 (7th Cir. 1988).

All of this suggests a simple demarcation. If the injury flows from the initiation or prosecution of the case, then the prosecutor is immune and the defendant must look to the court in which the case pends to protect his

interests. If, however, a constitutional wrong is complete before the case begins, then the prosecutor should be treated as a police detective would be in like circumstances: qualified rather than absolute immunity. Prosecutors who break open doors or torture suspects into confessing cause injuries that are complete outside of court, and which the judge cannot diminish (but may be able to compensate). Prosecutors whose out-of-court acts cause injury only to the extent a case proceeds will be brought to heel adequately by the court. *Butz*, 438 U.S. at 515-16.

Intermediate cases are not hard to imagine. Our own *Burns v. Reed* is one, in which the prosecutor gave legal advice to police who were considering whether to carry out a search. Injuries from illegal searches are felt out of court and without regard to the institution of a prosecution, which cuts against absolute immunity; on the other hand, the availability of prosecutorial advice may reduce the number of illegal searches, and allowing damages on account of bad advice may in the long run increase the number of improper searches. *Burns* will consider where the balance lies. Activities in our case may be put on one or another side of the line with greater confidence.

B

Fitzsimmons announced Buckley's indictment to the press on March 9, 1984. According to the complaint Fitzsimmons informed the press about the contents of the indictment and added comments, such as his belief that the bootprint evidence would establish Buckley's guilt and his belief that Buckley was involved in a burglary

ring. The district court, following *Stepanian v. Addis*, 699 F.2d 1046 (11th Cir. 1983), and *Marx v. Gumbinner*, 855 F.2d 783 (11th Cir. 1988), concluded that Fitzsimmons is not entitled to absolute immunity for these statements, because they took place out of court and because press conferences are not "quasi-judicial" activities.

Whether press conferences are "quasi" something else does not matter, Immunity depends on how announcements could cause injury and on other functional considerations, not on nomenclature. *Imbler* expressly rejected a submission that the scope of absolute prosecutorial immunity should depend on the extent to which prosecutorial activity is "quasi-judicial". 424 U.S. at 420-21. We need to know how announcements injure, and where the constitutional wrong lies.

One possibility is that accusations of crime cause infamy. *Paul v. Davis*, 424 U.S. 693 (1976), holding that the Constitution does not deal with libel or slander by a public official, means that Fitzsimmons' announcement, standing alone, is not actionable under §1983. Some other injury is essential to create a constitutional wrong. Buckley maintains that the press conference created additional injury because a defendant with a blackened reputation will have trouble obtaining release on bail or a fair trial. The Nicarico murder was front page news throughout northern Illinois. So was the announcement of charges against Buckley, Cruz, and Hernandez; the press has followed the case avidly. By accusing Buckley of being a thief as well as a murderer, and by overstating the value of the bootprint evidence, the prosecutor improperly increased the chances of a conviction, Buckley's argument concludes.

This approach avoids the rock of *Paul* only by falling into the whirlpools of *Imbler*. For if the injury lies in an alteration of the probabilities at trial, the remedy lies in the criminal process rather than in damages litigation. Buckley was entitled to a decision on bail made on the record, as opposed to a decision made on the basis of prejudicial publicity. If the judge denied bail or set it too high, Buckley was entitled to appeal. Similarly, if the press conference poisoned some minds against him, Buckley was still entitled to a voir dire adequate to find unbiased jurors. If such a venire could not be found in DuPage County, Buckley was entitled to a change of venue – or to dismissal of the charges against him. See generally *Patton v. Yount*, 467 U.S. 1025 (1984); *Murphy v. Florida*, 421 U.S. 794 (1975); *Irvin v. Dowd*, 366 U.S. 717 (1961). If the judges who conducted the bail hearing and the trial did their jobs properly, they eliminated any constitutionally impermissible effects of the press conference. If they could not do so, then Buckley was entitled to the best remedy of all: dismissal of the prosecution.

Stating the constitutional wrong as an increase in the probability of an unfair trial demonstrates that absolute immunity applies to the announcement of the indictment. Given *Paul*, there was no (constitutional) injury independent of the indictment and trial. Buckley suffered no constitutional injury unless the judges failed to protect him at trial. This demonstrates that the suit against Fitzsimmons is a disguised attack on either the institution of the prosecution itself, or the decisions of the judges at the bail hearing and trial. Either way, it cannot be the basis of an award of damages.

Stepanian and *Marx* hold that prosecutors do not have immunity when announcing indictments. These cases ask whether a press conference is "quasi-judicial", an approach different from *Imbler's*. Neither *Stepanian* nor *Marx* identifies any constitutional wrong independent of the conduct of the litigation. We therefore respectfully disagree with the eleventh circuit.*

Hampton v. Hanrahan, 600 F.2d 600 (7th Cir. 1979), reversed in part on other grounds, 446 U.S. 754 (1980), is the only other decision requiring comment. Parts of Judge Swygert's opinion in that case may be understood to say that absolute immunity is never available for pretrial statements. 600 F.2d at 632-33. But Judge Pell did not accept that conclusion, *id.* at 661-62 (dissenting opinion), and Chief Judge Fairchild accepted Judge Swygert's conclusions only to an extent, *id.* at 648 (concurring in Judge Swygert's opinion "except as qualified by the following observations."). Chief Judge Fairchild observed, *id.* at 649, that *Paul v. Davis* prevents any recovery because of injury to reputation. Judge Swygert's opinion concludes that a prosecutor may be liable for "pretrial prejudice", 600 F.2d at 632, which was left undefined. It may be that he conceived of a species of pretrial detriment outside the ambit of *Paul v. Davis;* at all events none of the opinions in *Hampton* discussed whether immunity is available when the theory is that out-of-court statements led to

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* Because our decision creates a conflict among the circuits, it was circulated before release to all judges in regular active service. See Circuit Rule 40(f). Judges Cudahy and Ripple voted to hear the case in banc. Chief Judge Bauer and Judge Flaum did not participate in the consideration or decision of this case.

adverse judicial decisions (denial of release on bail and failure to seat an impartial jury). As this is Buckley's theory, his way to avoid *Paul v. Davis*, we conclude that *Hampton* offers him no support. When pretrial publicity produces constitutional injury only to the extent it influences the course of bail hearings or trial, the prosecutor is absolutely immune from damages.

C

Buckley charges Fitzsimmons and two of his assistants, King and Knight with misconduct during the investigation and the presentation of the case to the grand jury. Judge Leinenweber dismissed all of these claims, concluding that absolute immunity covers the entire investigation of a case, meetings with witnesses, presentations to a grand jury, and formulation of a decision to prosecute.

In the main, these conclusions are unexceptionable. Presenting the case to the grand jury, for example, is part of the prosecution proper. The selection of evidence to present to the grand jurors, and the manner of questioning witnesses, can no more be the basis of liability than may the equivalent activities before the petit jury. *Gray v. Bell*, 712 F.2d 490, 502-05 (D.C. Cir. 1983); *Lovelace v. Whitney*, 684 F. Supp. 1438, 1442-43 (N.D. Ill. 1988), affirmed by unpublished order under the name *Lovelace v. Hall*, 886 F.2d 332 (7th Cir. 1989).

Conversations between the prosecutors and the bootprint experts similarly may not be the basis of liability. Obtaining assessments from an expert witness, and preparing that witness for trial, causes no injury apart from

what happens in court. Obtaining evidence from voluntary suppliers does not violate any of a defendant's rights; only using that evidence could do so. For the reasons we have given, when the injury depends on the costs of the judicial process (including the risk of judicial error), the prosecutor has absolute immunity. Allowing an award of damages on the basis of witness preparation would evade not only the prosecutorial immunity of *Imbler* but also the testimonial immunity of *Briscoe*. These immunities do not give way just because the plaintiff directs his fire against activities preparing for immunized presentations in court. *Heidelberg v. Hammer*, 577 F.2d 429, 432 (7th Cir. 1978).

Buckley's allegation that assistant state's attorneys coercively interrogated *him* presents a different problem, however. Such interrogations may inflict injury before the judicial process begins, injury that would be no less if the grand jury declined to return an indictment. If a prosecutor participates in a raid that unconstitutionally invades a suspect's privacy, immunity is qualified rather than absolute. *Hampton v. Hanrahan*, 600 F.2d at 631-33; *Marrero v. Hialeah*, 625 F.2d 499 (5th Cir. 1980). For the same reason, if a prosecutor conducts a coercive interrogation, only qualified immunity is available. *Joseph v. Patterson*, 795 F.2d 549, 555 (6th Cir. 1986); *Rex v. Teeples*, 753 F.2d 840, 843-44 (10th Cir. 1985). To the extent *Myers v. Morris*, 810 F.2d 1437 (8th Cir. 1987), holds that prosecutors are absolutely immune from liability on account of their participation in an unconstitutional interrogation, we respectfully disagree.

Liability is appropriate, however, only when the constitutional violation is complete, and causes injury, out of

court. A prosecutor could be liable for depriving a suspect of food and sleep during an interrogation, or beating him with a rubber truncheon, or putting bamboo shoots under his fingernails. A prosecutor could not be mulcted for conducting an interrogation without *Miranda* warnings, because a suspect has no entitlement to the warnings themselves. *Miranda* warnings protect the right to counsel and have no independent stature. Interrogations without *Miranda* warnings thus do not violate a suspect's rights; the violation occurs only when the statements are used in criminal proceedings. *Baxter v. Palmigiano*, 425 U.S. 308, 316-18 (1976); cf. *Oregon v. Elstad*, 470 U.S. 298, 305-07 (1985); *Michigan v. Tucker*, 417 U.S. 433, 445-46 (1974). There is likewise no violation in "compelling" a suspect to speak, where the compulsion does not involve practices forbidden on other grounds. The right not to be compelled to testify against oneself is an evidentiary privilege. As the use immunity cases show, the government may require a suspect to speak, so long as it does not use the results against him. *Kastigar v. United States*, 406 U.S. 441 (1972). Arguments based on *Miranda* and the self-incrimination clause concern the conduct of the trial and therefore may not be the basis of damages; coercive tactics that are independently wrongful may, however, lead to awards.

It is too early to tell whether Buckley is relying on *Miranda* and the self-incrimination clause, or on the more general right not to be punished (through coercive tactics) in advance of trial. It was accordingly premature to dismiss this aspect of Buckley's complaint. He is entitled to produce evidence, if he has any, tending to show that

the prosecutors used tactics adding up to pretrial punishment. Because the injury from such tactics does not depend on the filing of an indictment or the conduct of trial, the prosecutors have no more than qualified immunity.

IV

Last comes the question whether the three expert witnesses have absolute immunity for their pretrial activities: evaluating the bootprint, writing reports, discussing the case with prosecutors, and preparing to testify. We agree with the district court that they do. *Briscoe* holds that the presentation of testimony may not be the basis of liability, even if the witness deliberately misleads the court. It would be a hollow immunity if the aggrieved party could turn around and say, in effect: "True, your *delivery* of bad testimony is immunized, but preparing to deliver that testimony is not, so I can litigate the substance of your testimony." Substance is exactly what *Briscoe* puts off limits.

An expert could violate a suspect's rights independently of the litigation. The expert might, for example, break into the suspect's home to obtain samples for analysis. Absolute immunity would not apply to that theft, for the same reason it does not apply to prosecutorial infliction of punishment without trial. A non-testimonial expert could violate a suspect's rights by "cooking" a laboratory report in a way that misleads the testimonial experts. Experts, like the police, "cannot hide behind [the immunity of] the officials whom they have defrauded."

Jones v. Chicago, 856 F.2d at 994. But nothing in the complaint suggests that the three expert defendants hid evidence, as opposed to misinterpreting it.

Discussions between the prosecutors and the experts violated none of Buckley's rights. Preparing to commit slander or perjury is not actionable. The testimony itself is covered by immunity. Buckley makes it clear that the testimony is the real gravamen of his complaint. Olsen, he submits, "wrongfully changed his initial opinion"; Robbins was an "utterly disreputable witness-for-hire". Maybe so, but cross examination rather than a suit for damages is the right way to establish these things. Junk science is a plague in contemporary litigation, but the peddlers of poorly supported theories do not expose themselves to liability by doing research out of court or appearing in more than one case.

White v. Frank, 855 F.2d 956 (2d Cir. 1988), holds that *Briscoe* does not apply to "complaining witnesses". Buckley contends that the three experts are in this category, because but for their opinions the State's Attorney would not have obtained an indictment. The parallel is not apt. None of the experts invented the report of a crime or brought the fable to the state's attention. Jeanine Nicarico is dead. Each expert was brought into the case by the prosecutors, who sought to evaluate the strength of the evidence against Buckley. We therefore need not decide whether to follow *White*.

To sum up: We decline to accept the appeal on the district court's certification under §1292(b). DuPage County's appeal, No. 89-2900, is dismissed on the

County's motion. Buckley's appeal, No. 89-2899, is dismissed to the extent is [sic] seeks relief against DuPage County and Fitzsimmons. We affirm the remainder of the decisions under review on appeal No. 89-2899, with the exception of the contention that the prosecutors engaged in coercive interrogation. The decision is vacated to the extent it dismissed this portion of the complaint and the case is remanded for further proceedings concerning Fitzsimmons, King and Knight consistent with Part III.C of this opinion. On Fitzsimmons' appeal, No. 89-2441, the decision of the district court is reversed, and the case is remanded with directions to dismiss the complaint to the extent it seeks damages on account of the press conference at which Fitzsimmons announced the indictment.

FAIRCHILD, *Senior Circuit Judge*, dissenting in part and concurring in part:

For the most part, I concur. I, however, have a different view concerning the immunity of prosecutor Fitzsimmons for his alleged creation of prejudicial pretrial publicity. With great respect, I think that Part III, B of the opinion fails to examine the nature of the particular function Fitzsimmons was performing so as to determine whether it presented the public interest needs which justify absolute immunity.

The majority says, "If the injury flows from the initiation or prosecution of the case, then the prosecutor is immune and the defendant must look to the court in which the case pends to protect his interests." This "demarcation" is applied to Mr. Fitzsimmons's press conference statements which are alleged to militate against a fair trial.

The majority leans on the fact that as defendant, Buckley may have been able to protect himself by procedures afforded in the criminal case itself. With all respect, absolute immunity should be recognized only when the purpose of such immunity is served.

In *Imbler v. Pachtman*, 424 U.S. 409 (1976), the Supreme Court decided to afford the same absolute immunity under section 1983 that the prosecutor enjoys at common law. *Id.* at 427. The considerations underlying such immunity include "concern that harassment by unfounded litigation would cause a deflection of the prosecutor's energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust." *Id.* at 423. The Court agreed that the prosecutor's activities under consideration "were intimately associated with the judicial phase of the criminal process, and thus were functions to which the reasons for absolute immunity apply with full force." The Court did not consider whether "like or similar reasons require immunity for those aspects of the prosecutor's responsibility that cast him in the role of an administrator or investigative officer rather than that of an advocate." *Id.* at 430-31 (footnotes omitted).

In the Supreme Court's most recent absolute immunity case, *Forrester v. White*, 484 U.S. 219, 227 (1988), the Court considered the scope of judicial immunity and decided that demoting or discharging a probation officer was not a function which entitles a judge to immunity. The Court explained its functional approach saying, "[W]e examine the nature of the functions with which a particular official or class of officials has been lawfully

entrusted, and we seek to evaluate the effect that exposure to particular forms of liability would likely have on the appropriate exercise of those functions. Officials who seek exemption from personal liability have the burden of showing that such an exemption is justified by overriding considerations of public policy. . . . " *Id.* at 224. The Court did note that court procedures provide safeguards, *id.* at 227, but it did not present the safeguards as a reason for conferring immunity.

Even in *Butz v. Economou*, 438 U.S. 478, 511-512 (1978), a case in which the Court extensively discussed judicial procedure as a safeguard, the Court examined the adequacy of the protections only after it determined that the administrative judges and prosecutors whose immunity was at stake were performing the functions that entitle judges and prosecutors in the judicial branch to absolute immunity.

It is true that procedures afforded in our system of justice give a defendant a good chance to avoid such results of prejudicial publicity as excessive bail, difficulty or inability of selecting an impartial jury, and the like. These procedures reduce the cost of impropriety by a prosecutor, but I do not find that the courts have recognized their availability as a sufficient reason for conferring immunity.

Prejudicial pretrial publicity may make it more difficult and more expensive for a defendant to protect the fairness of his trial, and I would recognize that as a constitutional wrong for which damages can be obtained where the prosecutor has acted wrongfully at a stage,

such as a press conference, where the purposes to be served by immunity do not apply.

Whether Buckley has sufficiently pled or could prove that Fitzsimmons's statements at the press conference deprived him of constitutional rights seems to me to pertain to the merits, which have not yet been reached.

I would affirm the district court's denial of absolute immunity for Fitzsimmons with respect to his press conference statements.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

SUPREME COURT OF THE UNITED STATES

No. 90-7574

STEPHEN BUCKLEY

Petitioner,

vs.

MICHAEL FITZSIMMONS, et al.

Respondents.

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Seventh Circuit.

The motion for leave to appeal *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Seventh Circuit for further consideration in light of *Burns v. Reed*, 500 U.S. ___ (1991).

October 7, 1991

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 89-2441, 89-2899, and 89-2900

STEPHEN BUCKLEY,

Plaintiff-Appellee – Cross-Appellant,

v.

J. MICHAEL FITZSIMMONS, *et al.*,

Defendants-Appellants – Cross-Appellees.

ON REMAND FROM THE
SUPREME COURT OF THE UNITED STATES.

SUBMITTED NOVEMBER 15, 1991 – DECIDED JANUARY 2, 1992

Before WOOD, Jr. and EASTERBROOK, *Circuit Judges*, and FAIRCHILD, *Senior Circuit Judge*.

PER CURIAM. The Supreme Court remanded this case to us for reconsideration in light of *Burns v. Reed*, 111 S. Ct. 1934 (1991). 112 S. Ct. 40 (1991). *Burns* potentially affects the availability of immunity on two subjects: Fitzsimmons' press conference announcing Buckley's indictment, and the prosecutors' and witnesses' preparations for trial. Buckley contends that we should reconsider our decisions concerning appellate jurisdiction, but

his petition for certiorari did not present any jurisdictional question to the Supreme Court. As instructed, we limit our consideration to the effect of *Burns*.

Burns holds that prosecutors are not entitled to absolute immunity for advice to police concerning the propriety of hypnosis and probable cause to make an arrest. It also holds that prosecutors are absolutely immune from damages on account of injuries they inflict during the course of an *ex parte* probable cause hearing that led to the issuance of a search warrant. Our case is not directly governed by *Burns*. Indeed, our initial decision recognized that *Burns* was awaiting decision by the Supreme Court, and we observed that the subjects are distinct. 919 F.2d 1230, 1239, 1242 (7th Cir. 1990). Still, the reasoning of a case may reach beyond its holding, and the Court has invited us to revisit the subject.

First we take up the preparation for trial. Law enforcement officials asked four persons to determine whether Buckley's shoe made the bootprint found on the Nicaricos' door. One said no; a second said maybe; a third said probably, and the fourth said yes. All but the one who said no testified against Buckley, who seeks damages from all three. He also seeks damages from the prosecutors for their "supervision of and participation in a year long pre-arrest and pre-indictment investigation". Our initial opinion held that both the witnesses and the prosecutors are entitled to absolute immunity for these activities, save to the extent they independently violated Buckley's rights. (We remanded for further proceedings on Buckley's claim that the prosecutors coerced him to give pretrial statements.) According to *Imbler v. Pachtman*, 424 U.S. 409 (1976), and *Briscoe v. LaHue*, 460 U.S. 325

(1983), both prosecutors and witnesses are entitled to absolute immunity for what happens in court. We remarked: "It would be a hollow immunity if the aggrieved party could turn around and say, in effect: 'True, your *delivery* of bad testimony is immunized, but preparing to deliver that testimony is not, so I can litigate the substance of your testimony.' " 919 F.2d at 1245.

Nothing in *Burns* undermines that holding. It would be a hoax to proclaim immunity for presentation of testimony in court if the person aggrieved by that testimony may attack its preparation. Immunity is not limited to *un*prepared events at trial! Allowing evasion through litigation about preparation for trial would make no more sense than undermining judicial immunity by entertaining a suit against the law clerk who participated in the preparation of the opinion. See *Mitchell v. McBryde*, 944 F.2d 229 (5th Cir. 1991); *Oliva v. Heller*, 839 F.2d 37 (2d Cir. 1988). Immunities cover not only the core functions sought to be protected but also normal preparatory steps. *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 503-07 (1975).

Although *Burns* distinguishes "prosecutorial" activities from "investigative" ones, it is word play to call prosecutors' endeavors in asking experts for assistance "investigative" in the way hypnotizing or arresting suspects is. Talking with (willing) experts is trial preparation, no different from putting evidence under a microscope in a laboratory. (Interrogating Buckley is a different matter, which is why we directed further proceedings on claims about the prosecutors' treatment of him.) Slapping the label "conspiracy" on the process, as Buckley does, adds nothing.

Imbler said it straight: "[T]he duties of the prosecutor in his role as advocate for the State involve actions preliminary to the initiation of a prosecution". 424 U.S. at 431 n.33. *Burns* did not express a different view; instead it quoted this language with approval. 111 S. Ct. at 1941-42. What goes for prosecutors goes for witnesses too. We therefore reiterate the conclusion of our initial decision: unless the act of gathering and evaluating the evidence independently violates someone's rights (as, for example, by seizing persons or things in violation of the fourth amendment), both witnesses and prosecutors are entitled to the same immunity they possess when they present the evidence in court. See also *Millspaugh v. Wabash County Department of Public Welfare*, 937 F.2d 1172, 1175 (7th Cir. 1991), concluding that *Burns* "reinforces *Buckley's* approach."

Burns bears more strongly on Buckley's claim arising out of the press conference. Like the advice to the police in *Burns*, the press conference took place out of court and was not part of preparation for trial. The prosecutor acted as a public official informing residents about the activities of his office – and perhaps preparing for an election campaign – rather than as an advocate. It does not follow, however, that the press conference should be assimilated to advising police to arrest a suspect, the subject of *Burns*. An arrest causes injury whether or not a prosecution ensues. So too a press conference may cause injury no matter what happens later – but the injury in question is defamation, which under *Paul v. Davis*, 424 U.S. 693 (1976), is not a constitutional wrong. See also *Siegert v. Gilley*, 111 S. Ct. 1789 (1991). Fitzsimmons does not need

immunity to defeat a claim of defamation, because Buckley has none. (Buckley contends that our original decision misapplies *Paul*. But this topic was not raised in the Supreme Court – the petition for certiorari does not cite *Paul* – and so is not encompassed within the remand.)

According to Buckley, the press conference violated his rights because the publicity deprived him of a fair bail hearing and trial. Buckley protests, in other words, what happened *in court* – that the judge erred in refusing to dismiss the prosecution on account of prejudicial publicity, or at least to enlarge him pending trial. Because the sting (apart from the defamation) depends on judicial action, *Imbler* confers immunity. So we remarked in *Millspaugh*, 937 F.2d at 1175: "the dividing line between absolute and qualified immunity is whether the injury depends on the judicial decision. If there would be no loss but for the judge's acts, then the prosecutor or witness who induces the judge to act has absolute immunity. . . . *Burns* held a lawyer absolutely immune from liability for acts while representing the state during a probable cause hearing but only qualifiedly immune for giving legal advice to the police; the principal distinction was that the advice (and the officers' acts in reliance on that advice) could cause injury without the mediation of a judge." Fitzsimmons' press conference could cause no *actionable* harm without the mediation of a judge. The defamation aspect of Buckley's claim fails under *Paul* and *Siegert*, the remainder under *Imbler*.

Burns identifies three considerations governing the scope of prosecutorial immunity: the common law in 1871 (when Congress enacted 42 U.S.C. §1983), the risk of vexatious litigation if immunity is unavailable, and the

role of the judicial process in controlling the prosecutor if damages are unavailable. The first of these favors Buckley, for common law immunity did not extend to press conferences. This may be an artifact: if courts do not recognize particular conduct as actionable, they have no reason to discuss immunity. No court would have thought a prosecutor's announcement of an indictment actionable in the first place in the nineteenth century. Justice Scalia, concurring in *Burns*, maintained that immunity at common law is a necessary condition for immunity in an action under §1983. 111 S. Ct. at 1945. This approach, if adopted, would sever the link between immunities in §1983 actions and those in *Bivens* actions established by cases such as *Butz v. Economou*, 438 U.S. 478 (1978), and *Mitchell v. Forsyth*, 472 U.S. 511 (1985). Liability directly under the Constitution is a modern development, and it is accordingly hard (maybe impossible) to find corresponding immunities. So, too, it is hard to find immunities corresponding to recent enlargements in substantive liability. Cf. *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 111 S. Ct. 2773, 2783 (1991) (Scalia, J., concurring) (observing that although state law ordinarily supplies statutes of limitations, federal law properly may be matched to newly minted theories of liability). The majority did not stop with the common law in *Burns*.

The second and third considerations favor Fitzsimmons. Buckley wants to use the press conference as the fulcrum to attack the substance of the charges laid against him, even though their presentation in court cannot be the basis of damages. So although the concern about

vexatious litigation is limited to "actions that are connected with the prosecutor's role in judicial proceedings", *Burns*, 111 S. Ct. at 1943, Buckley places that role (like the prosecution itself) in question. As for the third consideration: this was at the core of our original decision. We relied particularly on this language from *Butz*, 438 U.S. at 512: "[S]afeguards built into the judicial process tend to reduce the need for private damages actions as a means of controlling unconstitutional conduct." 919 F.2d at 1241. *Burns* quoted the same language with approval, 111 S. Ct. at 1942, and called the judicial process "one of the most important checks", *id.* at 1944. As we have been at pains to establish, Buckley had the benefit of the judicial process. If the press conference created prejudicial publicity, the injury occurred because of judicial action. It is only because the judge denied Buckley's application for release before trial and refused to dismiss the indictment that he suffered the loss for which he seeks damages from Fitzsimmons.

Buckley spent three years in jail. He craves vindication and redress. Yet for all counsel's inventiveness, it is apparent that he challenges the prosecution itself. *Imbler* reflects a judgment that prosecutors should be free to press criminal charges without fear that prosecuting the wrong person, or the right person in the wrong way, will lead to financial ruin.† If, as Buckley insists, *Imbler* was

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† State and local governments can prevent this effect for themselves by indemnifying their officers, and many do so. Indemnification enables public officials to set their personal concerns aside, assures adequate compensation of those the state has injured, and induces the government to exercise better control over those who exercise public power. Yet not all governmental bodies indemnify their employees, and the same principles of immunity apply to all. If the promise of indemnity were to enlarge public officers' liability (and thus the cost of the indemnity), states would be inclined to jettison or curtail their programs. Thus we approach the subject, as the Supreme Court consistently does, on the assumption that the defendants must pay any awards personally.

wrongly decided, he should press that argument in the only forum that can entertain it.

Buckley presents claims against governmental bodies that do not possess immunity and against the prosecutors who interrogated him; the former we have not addressed, and the latter we have remanded for further proceedings. Buckley's memorandum filed in this court after remand asserts that one or more of the assistant state's attorneys actually arrested him. Had we perceived on the original appeal that Buckley was making such a claim, we would have included it among the subjects remanded to the district court. The rationale behind Part III.C of our opinion, 919 F.2d at 1243-44, applies equally to a claim of arrest without probable cause. See also *Malley v. Briggs*, 475 U.S. 335 (1986); *Millspaugh*, 937 F.2d at 1176. We modify our judgment to direct the district court to explore the allegation that the persons who arrested him lacked probable cause. All other claims are barred by immunity, and we reenter our original judgment except to the extent we have described.

FAIRCHILD, *Senior Circuit Judge*, dissenting in part: I adhere to my earlier dissent, concluding there was no absolute immunity for the prosecutor's press conference. *Buckley*, 919 F.2d at 1245.

Going on from there, the Supreme Court in *Burns* seems to draw a line between "conduct closely related to the judicial process," *Burns*, 111 S. Ct. 1943, and conduct in the role of "administrator or investigative officer." *Id.* at 1942. As to the latter functions, the prosecutor has only the protection of qualified immunity. The *Burns* Court seems to imply that the increased availability of the defense of qualified immunity is a reason for not expanding, and, perhaps, construing narrowly the application of absolute immunity for prosecutors. *Id.* at 1944.

My brethren draw the line between investigation and "preparation," evidently deeming preparation for trial sufficiently close to the judicial process to entitle the prosecutor to absolute immunity. I agree that a prudent prosecutor will interview witnesses and test other evidence brought to him by investigators in advance of trial. He may well ask for further investigation of areas of a case. I can agree that such "preparation" should fall on the absolute immunity side of the line. Plaintiff claims, however, that Mr. Fitzsimmons played a very aggressive role in seeking favorable expert evidence linking the incriminating boot print to plaintiff, and in "supervision of and participation in a year long pre-arrest and pre-indictment investigation." I am unable to conclude as a matter of law that this alleged conduct falls on the side of the line to which the *Burns* Court ascribed absolute immunity.

SUPREME COURT OF THE UNITED STATES

No. 91-7849

Stephen Buckley,

Petitioner

v.

Michael Fitzsimmons, et al.

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Seventh Circuit.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby granted limited to Questions 1 and 2 presented by the petition.

October 5, 1992